DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-99
Vide 12-312
Title: Unite Here Local 355, Petitioner
v.
Martin Mulhall, et al.
Docketed: July 24, 2012
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (11-10594)
Decision Date: January 18, 2012
Rehearing Denied: April 25, 2012
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Jul 20 2012	Petition for a writ of certiorari filed. (Response due August 23, 2012)
Aug 22 2012	Brief of respondent Martin Mulhall in support filed.
Sep 5 2012	DISTRIBUTED for Conference of September 24, 2012.
Oct 10 2012	DISTRIBUTED for Conference of October 26, 2012.
Oct 31 2012	Response Requested . (Due November 30, 2012)
Nov 20 2012	Brief of respondent Hollywood Greyhound Track, Inc.d/b/a/ Mardi Gras Gaming in opposition filed. VIDED.
Nov 21 2012	Response to conditional cross - petition from respondent Unite Here Local 355 filed. VIDED.
Nov 30 2012	Reply of cross-petitioner Martin Mulhall filed. VIDED.
Dec 4 2012	Reply of petitioner Unite Here Local 355 filed. VIDED.
Dec 5 2012	DISTRIBUTED for Conference of January 4, 2013.
Jan 7 2013	DISTRIBUTED for Conference of January 11, 2013.
Jan 14 2013	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 24 2013	Brief amicus curiae of United States filed. VIDED.
Jun 3 2013	Supplemental brief of Martin Mulhall in response to brief amicius curiae of the United States filed. (Distributed) VIDED.
Jun 3 2013	Reply of petitioner Unite Here Local 355 to brief for United States as amicus curiae filed. VIDED. (Distributed)
Jun 4 2013	DISTRIBUTED for Conference of June 20, 2013.
Jun 24 2013	Petition GRANTED.
Jul 12 2013	The time to file the joint appendix and petitioners' brief on the merits in the

	above-entitled case is extended to and including August 15, 2013.
Jul 12 2013	The time to file respondents' briefs on the merits is extended to and including September 20, 2013.
Jul 24 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondent Hollywood Greyhound Track, Inc.
Jul 24 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondent Martin Mulhall.
Aug 13 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for petitioner.
Aug 15 2013	Joint appendix filed.
Aug 15 2013	Brief of petitioner Unite Here Local 355 filed.
Aug 20 2013	SET FOR ARGUMENT on Wednesday, November 13, 2013.
Aug 20 2013	Brief amicus curiae of National Academy of Arbitrators filed.
Aug 22 2013	Brief amicus curiae of United States filed.
Aug 22 2013	Brief amici curiae of American Federation of Labor and Congress of Industrial Organizations, et al. filed. (Distributed)
Aug 26 2013	CIRCULATED.
Sep 16 2013	Record received from U.S.C.A. for 11th Circuit. (1 envelope)
Sep 17 2013	Record received from U.S.D.C. for Southern District of Florida. (1 box)
Sep 20 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Sep 20 2013	Brief of respondent Martin Mulhall filed. (Distributed)
Sep 20 2013	Brief of respondent Hollywood Greyhound Track, Inc. filed. (Distributed)
Sep 27 2013	Brief amici curiae of National Federation of Independent Business Small Business Legal Center, et al. filed. (Distributed)
Sep 27 2013	Brief amicus curiae of Council on Labor Law Equality filed. (Distributed)
Sep 27 2013	Brief amicus curiae of Center for Constitutional Jurisprudence filed. (Distributed)
Oct 18 2013	Reply of petitioner Unite Here Local 355 filed. (Distributed)
Oct 21 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Nov 13 2013	Argued. For petitioner: Richard G. McCracken, San Francisco, Cal.; and Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) for respondents: William L. Messenger, Springfield, Va.

PETITION FOR WRIT OF CERTIORARI

12-99

No. _____

In The

Supreme Court of the United States

UNITE HERE LOCAL 355,

Petitioner,

v.

MARTIN MULHALL; HOLLYWOOD GREYHOUND TRACK, INC. d/b/a MARDI GRAS GAMING,

Respondents.

On Petition For Writ Of Certiorari To The Eleventh Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

RICHARD G. MCCRACKEN*
ANDREW J. KAHN
PAUL L. MORE
DAVIS, COWELL & BOWE LLP
595 Market Street, Suite 1400
San Francisco, CA 94105
(415) 597-7200
rmccracken@dcbsf.com

Counsel for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Section 302 of the Labor-Management Relations Act, 29 U.S.C. § 186 – the federal labor anti-bribery statute – makes it criminal for an employer "to pay, lend, or deliver . . . any money or other thing of value" to a labor union that seeks to represent its employees, and prohibits the labor union from receiving the same. The Third and Fourth Circuits have held that agreements between employers and unions that set ground rules for union organizing campaigns – including employer promises to remain neutral and recognize the union upon a showing of majority support, and union promises to forego the rights to picket, boycott, or otherwise put pressure on the employer's business – are not "payment" of "things of value" proscribed by § 302. The Third Circuit found that a contrary holding would "wreak havoc on the carefully balanced structure of the laws governing recognition of and bargaining with unions." *Hotel Employees & Restaurant Employees, Local 57 v. Sage Hospitality Resources, LLC*, 390 F.3d 206, 219 (3d Cir. 2004), *cert. denied*, 125 S.Ct. 1944 (2005). In this case, however, the Eleventh Circuit came to the opposite conclusion. The question presented is:

Whether an employer and union may violate § 302 by entering into an agreement under which the employer exercises its freedom of speech by promising to remain neutral to union organizing, its property rights by granting union representatives limited

QUESTION PRESENTED – Continued

access to the employer's property and employees, and its freedom of contract by obtaining the union's promise to forego its rights to picket, boycott, or otherwise put pressure on the employer's business?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit were Petitioner UNITE HERE Local 355 (the "union"), Respondent Martin Mulhall, and Co-defendant Hollywood Greyhound Track, Inc. d/b/a Mardi Gras Gaming ("Mardi Gras" or the "employer"). None of these parties has a parent corporation or is owned by a publicly held company. The United States Department of Justice; United States Department of Labor; the National Labor Relations Board; the American Federation of Labor and Congress of Industrial Organizations; Change to Win; Communications Workers of America; International Brotherhood of Teamsters; Service Employees International Union; United Automobile Workers; United Food and Commercial Workers International Union; United Steel Workers; and National Federation of Independent Business Small Business Legal Centers appeared as *amici curiae* in the Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI

Petitioner UNITE HERE Local 355 respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit from which this petition for writ of certiorari is taken is reported as *Mulhall v. UNITE HERE Local 355 et al.*, 667 F.3d 1211 (11th Cir. 2012) ("*Mulhall II*"). App. 1-12. A previous appellate decision is reported as *Mulhall v. UNITE HERE Local 355 et al.*, 618 F.3d 1279 (11th Cir. 2010) ("*Mulhall I*"). App. 34-60. The order denying the petition for rehearing and for rehearing *en banc*, App. 61-62, is not reported. The opinions of the district court, App. 13-23 and App. 24-33, are not reported.

JURISDICTION

The Court of Appeals entered its judgment on January 18, 2012. App. 1. It denied the union's petition for rehearing on April 25, 2012. App. 61-62. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 302 of the Labor-Management Relations Act of 1947 ("LMRA" or "Taft-Hartley amendments"), 29 U.S.C. § 186, provides in relevant part:

> (a) [Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations] It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value –
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce;
>
> (3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) [Request, demand, etc., for money or other thing of value]

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) [of this section].

* * *

(c) [Exceptions] (omitted).

STATEMENT OF THE CASE

The Eleventh Circuit has become the first court since the LMRA was enacted to hold that an agreement between an employer and a union setting ground rules for organizing – including promises by the employer not to oppose union representation, to let the union onto its property to talk to employees, and to give the union employees' names and addresses, and promises by the union to forego its rights to picket, boycott or otherwise put pressure on the employer's business – may violate LMRA § 302, 29 U.S.C. § 186. The theory has been pressed on other courts, all of

which have rejected it soundly. *Adcock v. Freightliner LLC*, 550 F.3d 369, 374-76 (4th Cir. 2008); *Sage Hospitality*, *supra*, 390 F.3d at 218-19. This Court and the courts of appeals have unanimously and for decades enforced agreements of the sort at issue here. Only now, 65 years after the passage of the Taft-Hartley amendments to the National Labor Relations Act, 29 U.S.C. §§ 151-169 ("NLRA" or the "Act"), has the propriety of this important part of cooperative labor-management relations been put in doubt.

Mardi Gras and the union entered into a Memorandum of Understanding ("neutrality agreement"). App. 78-86. The neutrality agreement required Mardi Gras to voluntarily recognize the union as the representative of its employees if a majority gave written authorizations to the union to be their agent. App. 81-82, ¶ 9. It also provided that if the union conducted an organizing campaign among the employees, Mardi Gras would remain neutral and would not try to influence its employees' decision one way or another. App. 79, ¶ 4. Mardi Gras promised to allow the union to communicate with its employees by letting union representatives onto its premises and giving the union its employees' names and addresses. App. 80-81, ¶¶ 7, 8. In return, the union promised not to strike, picket, or engage in other economic action against Mardi Gras while the neutrality agreement was in effect. App. 82, ¶ 11. The decision below states erroneously that the union promised to refrain from taking such actions only "if recognized as the exclusive bargaining agent for Mardi Gras's employees."

App. 3. In fact, the union promised not to take such actions "[d]uring the life of" the neutrality agreement, not merely if it was recognized as the Mardi Gras employees' collective bargaining representative. App. 82, ¶ 11. The parties further agreed that the agreement would not take effect until Mardi Gras had installed slot machines. App. 85, ¶ 15.

The union supported a successful Florida ballot initiative legalizing slot machines at racetracks in the Miami-Dade area, including Mardi Gras. App. 38. After the initiative passed, Mardi Gras installed slot machines, and the union engaged in organizing activity among the employees. There has also been arbitration under the neutrality agreement. App. 38-39.

Plaintiff brought this action against UNITE HERE Local 355 and Mardi Gras, under § 302 of the LMRA, 29 U.S.C. § 186, in the United States District Court for the Southern District of Florida, asserting jurisdiction under 29 U.S.C. § 186(e). App. 63-86. Plaintiff alleges that he is an employee of Mardi Gras. App. 64. He does not contend that the entire neutrality agreement violates § 302. Rather, he claims that the provisions for neutrality, access, and employee names and addresses are each the "delivery" of a "thing of value" under § 302 and therefore illegal. App. 67-70, ¶¶ 14, 17(c), ¶ 20(c), ¶ 25(c).

The District Court dismissed the case on standing grounds, App. 29-33, which the Eleventh Circuit reversed in *Mulhall I*, App. 60. On remand, the District Court dismissed the case for failure to state a

claim under § 302. App. 13-23. Relying on *Adcock*, *supra*, 550 F.3d 369, and *Sage Hospitality*, *supra*, 390 F.3d 206, the district court held that providing employee lists, facility access, and neutrality does not constitute the "delivery" of a "thing of value" prohibited by § 302. The court explained that the purpose of § 302 is to prevent the corruption of union officers and found that "[t]here is no indication of corruption or bribery of Unite Here officials" in this case. App. 19.

A divided panel of the Eleventh Circuit reversed. It held that the complaint sufficiently stated a claim under § 302 and remanded for further proceedings, with Judge Restani dissenting. App. 1-12. The Court of Appeals majority recognized that "intangible organizing assistance cannot be loaned or delivered because the actions 'lend' and 'deliver' contemplate the transfer of tangible items." App. 7. But the majority relied upon its "common sense" in concluding that an employer could improperly influence a union through an agreement facilitating the union's desire to organize the employer's employees because "innocuous ground rules can become illegal payments if used as valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer." App. 8. The court did not explain how an agreement giving the union the means to realize what the Act promotes – collective bargaining and labor peace – could be illegal or the mechanism by which corruption could be accomplished.

In dissent, Judge Restani pointed out that the complaint does not allege that Mardi Gras offered the organizing assistance as a bribe and "makes no allegation of wrongdoing relating to the formation of the Agreement[.]" App. 10, 11. But more importantly, Judge Restani pointed out that the majority's interpretation of § 302 is inconsistent with the LMRA's purpose: "The LMRA is designed to promote both labor peace and collective bargaining. The LMRA cannot promote collective bargaining and, at the same time, penalize unions that are attempting to achieve greater collective bargaining rights." App. 10-11 (internal citations omitted).

The union filed a timely petition for rehearing or rehearing *en banc*. The United States Department of Justice, the United States Department of Labor, and the National Labor Relations Board filed a joint brief for the United States as *amicus curiae* disagreeing with the Eleventh Circuit's analysis and supporting the petition for rehearing. The petition for rehearing was denied. App. 61-62.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT DECISION GIVES § 302 A MEANING CONTRARY TO CONGRESS'S INTENT.

Section 302 makes it unlawful for an employer "to pay, lend, or deliver . . . any money or other thing of value" to a labor organization that represents or

seeks to represent the employer's employees. 29 U.S.C. § 186(a)(2). The Court described the purpose of § 302 in *Arroyo v. United States*, 359 U.S. 419, 425-26 (1959) (internal citations omitted):

> Those members of Congress who supported the amendment were concerned with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control. Congressional attention was focused particularly upon the latter problem[.]

See Turner v. Local Union No. 302, Int'l Bhd. of Teamsters, 604 F.2d 1219, 1227 (9th Cir. 1979) ("The dominant purpose of § 302 is to prevent employers from tampering with the loyalty of union officials and to prevent union officials from extorting tribute from employers."); *Toth v. USX Corp.*, 883 F.2d 1297, 1300 (7th Cir. 1989) ("It is fairly universally acknowledged that a central purpose of section 302 as a whole was to prevent employers from bribing union officials."); *U.S. v. Phillips*, 19 F.3d 1565, 1574 (11th Cir. 1994); *Bricklayers, Masons & Plasterers Intern. Union, Local 15 v. Stuart Plastering Co., Inc.*, 512 F.2d 1017, 1024 (5th Cir. 1975). That purpose has remained constant throughout the later evolution of § 302. "In enacting amendments [to § 302 in 1959, 1969 and 1973] . . . Congress reaffirmed the purpose of § 302 as the limited one of 'prevent[ing] bribery, extortion, shakedowns, and other corrupt practices.'" *BASF Wyandotte Corp.*

v. Local 227, Int'l Chem. Workers Union, 791 F.2d 1046, 1053 (2d Cir. 1986) (internal citation omitted).

This case does not implicate at all § 302's primary concern with union use of welfare trusts as "slush funds." Therefore, Plaintiff must show that the neutrality agreement somehow corrupts the union's representation of employees. This aspect of § 302(a)'s purpose is to "protect employers from extortion and to insure honest, uninfluenced representation of employees[.]" *United Steelworkers of America v. U.S. Gypsum Co.*, 492 F.2d 713, 734 (5th Cir. 1974).

The paradigm of a § 302 violation is a kickback to a union official to not organize or to favor the employer in bargaining. *See, e.g., Phillips*, *supra*, 19 F.3d at 1566-69 (union representatives conditioned the acceptance of an unfavorable local collective agreement on the employer's agreement to make retroactive pension payments for themselves and several other union employees); *United States v. Pecora*, 798 F.2d 614, 618 (3d Cir. 1986) (union officials received employer payments in return for influencing union to allow employer to hire non-union drivers in violation of its collective bargaining agreement); *United States v. Ferrara*, 458 F.2d 868, 870 (2d Cir. 1972) (company representative paid union officials to eliminate provision in collective bargaining agreement that allowed employees to eat free of charge while on duty); *United States v. Bloch*, 696 F.2d 1213, 1214 (9th Cir. 1982) (payoffs to union officials in return for officials' excepting them from union local hiring requirement), *abrogated on other grounds by United States v.*

Jimenez Recio, 123 S.Ct. 819, 823 (2003); *United States v. Novak*, 443 F.3d 150, 153-54 (2d Cir. 2006) (union vice president received employer-paid kickbacks in return for allowing contractors to use non-union labor in violation of collective bargaining agreement).

The neutrality agreement in this case does the opposite. The union gets the means to make organizing easier and less acrimonious, and there is no compromise of the union's duty of fair representation if it succeeds in being recognized. The agreement does not require employees to join the union or pay dues. It does not require them to accept union representation if the majority does not want it. It does not limit the ability of employees like Plaintiff to campaign with their co-workers against unionization. The agreement does not corrupt the bargaining process in any way and hence is not contrary to § 302's purpose.

In fact, it is the Eleventh Circuit's ruling that undercuts the NLRA's most important policies. Employers have freedom of contract (to make a contract when they see fit, or not). *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970). They have freedom of speech (to speak or not to speak). *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 68 (2008). They have the right to exclude from their property non-employee union organizers (or to allow them). *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536-38 (1992). They have the right – and, at times, the obligation – to provide unions with the names and addresses of their employees, something this Court has already held raises

no § 302 issue. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969); *see infra*, at p. 20. All of these core principles are endangered by the decision below, which effectively means that an employer must speak against collective bargaining, must forbid union organizers from entering its property, and must not give a union the means to contact employees about organizing.

The decision is also destructive of the Act's fundamental policies favoring collective bargaining and labor peace. *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785 (1996). The neutrality agreement in question here accomplishes both goals. It makes organizing easier for the union – toward the ultimate goal of bargaining collectively on employees' behalf – and the union therefore agrees not to take any action that might harm the employer's business.

II. THE ELEVENTH CIRCUIT DECISION CONFLICTS WITH SETTLED PRECEDENT AND THREATENS TO WREAK HAVOC ON BASIC LABOR LAW TENETS.

The decision below conflicts directly with the law of the other circuits that have considered the question. *Adcock*, *supra*, 550 F.3d 369; *Sage Hospitality*, *supra*, 390 F.3d 206. *See also Patterson v. Heartland Indus. Partners, LLP*, 428 F.Supp.2d 714, 723-24 (N.D. Ohio 2006). As the Third and Fourth Circuits have recognized, the notion that neutrality agreements

may violate § 302 cannot be squared with Congress's purpose.

> In this case, the concessions made by Freightliner do not involve bribery or other corrupt practices. By no stretch of the imagination are the concessions a means of bribing representatives of the Union; indeed, no representative of the Union personally benefited from these concessions. Rather, the concessions serve the interests of both Freightliner and the Union, as they eliminate the potential for hostile organizing campaigns in the workplace. In this sense, the concessions certainly are not inimical to the collective bargaining process.

Adcock, 550 F.3d at 375; *Sage Hospitality*, 290 F.3d at 219.

The Eleventh Circuit's decision also conflicts with the long, unbroken line of cases under LMRA § 301 enforcing neutrality agreements like the one at issue here. At the same time Congress enacted LMRA § 302, it enacted LMRA § 301, 29 U.S.C. § 185. Pub. L. No. 80-101, 61 Stat. 136, 156-157. Section 301(a) gives the federal courts jurisdiction over "suits for violation of contract between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act. . . ." 29 U.S.C. § 185(a). The purpose of § 301(a) was to make labor contracts equally binding on both employers and unions, to the end of promoting industrial peace through the enforcement of these contracts, including

the no-strike clauses Congress expected would be included in them. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 453-54 (1957).

The "contracts" enforceable under § 301(a) are not limited to collective bargaining agreements with incumbent unions. Section 301 gives federal courts jurisdiction over agreements "between employers and labor organizations significant to the maintenance of labor peace between them." *Retail Clerks v. Lion Dry Goods*, 369 U.S. 17, 28 (1962). It confers jurisdiction even where the contracting union is not currently the bargaining representative for the employees. *Id.* at 27. The contract this Court enforced in *Lion Dry Goods* was between an employer and two unions that did not represent its employees. The contract granted the unions access to the employer's premises, reinstated strikers, established employment terms, and limited the parties' right to demand a National Labor Relations Board ("NLRB") election. *Lion Dry Goods*, 369 U.S. at 20, n.4.

Following *Lion Dry Goods*, every court facing the issue has held that agreements between employers and non-incumbent unions governing procedures for future organizing and recognition – and containing the same types of provisions as the agreement here – are lawful and enforceable under § 301. *Sage Hospitality*, 390 F.3d at 218-19; *N.Y. Health & Human Svs. Union v. N.Y.U. Hosp. Ctr.*, 343 F.3d 117, 119 (2d Cir. 2003); *Service Employees Int'l Union v. St. Vincent Med. Ctr.*, 344 F.3d 977, 984-85 (9th Cir. 2003); *Int'l Union, UAW v. Dana Corp.*, 278 F.3d 548, 558-59 (6th

Cir. 2002); *AK Steel Corp. v. United Steelworkers*, 163 F.3d 403, 407-08 (6th Cir. 1998); *Hotel & Restaurant Employees Union, Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561, 566-67 (2d Cir. 1993); *Hotel & Restaurant Employees Union, Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1465-66 (9th Cir. 1992); *Amalgamated Clothing & Textile Workers Union v. Facetglas, Inc.*, 845 F.2d 1250, 1253 (4th Cir. 1988). Neutrality agreements with provisions like the one here are very common.[1] The decision of the Eleventh Circuit casts doubt, for the first time, on this prominent aspect of labor relations and will therefore have widespread, profound effects if it stands.

If the Eleventh Circuit were correct, the agreements in *Lion Dry Goods* and its progeny were illegal and unenforceable because they "paid" a "thing of value" under § 302. But Congress could not have intended that agreements that were illegal – criminal – under § 302 would nevertheless be enforceable under its companion, § 301(a). *Lion Dry Goods* and the line of cases flowing from it would be legally impossible if Plaintiff's contention were right.

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[1] *See* James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 828-31 (2005); Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 INDUS. & LAB. REL. REV. 42, 45-46 (2001); *see also In Re Lamons Gasket Co.*, 357 N.L.R.B. No. 72 (Aug. 26, 2011), slip op. at 7 (noting that NLRB received 1,333 notices of employers' voluntary recognition of a union between September 2007 and May 2011).

As Judge Chertoff wrote in *Sage Hospitality, supra*, the logic behind the idea that a neutrality agreement like the one here could violate § 302 would "wreak havoc" on existing federal labor law far beyond neutrality agreements. *Sage Hospitality, supra*, 390 F.3d at 219. A collective bargaining agreement is something of much greater value to a union than a neutrality agreement, as it sets employees' terms and conditions of employment and may contain a union-security clause and dues checkoff provision, as well as provisions providing for union-representative access. *See NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 744-45 (1963) (valid union-security clause is mandatory subject of bargaining); *Marquez v. Screen Actors Guild*, 525 U.S. 33, 44-48 (1998) (union may negotiate valid union-security clause without violating duty of fair representation); *Bethlehem Steel Co.*, 136 N.L.R.B. 1500, 1501-02 (1962) (union security and dues checkoff are mandatory subjects of bargaining); *NLRB v. Great Western Coca-Cola Bottling Co.*, 740 F.2d 398, 403 (5th Cir. 1984) ("It is clear that access by the employees' representatives constitutes a mandatory bargaining subject[.]"). Under the Eleventh Circuit's formulation, a neutrality agreement's provisions for neutrality, worksite access, and employee lists are "things of value" that can "operate as a payment" if their "performance fulfills an obligation." App. 8. But this reasoning applies equally to the identical benefits conferred on labor unions in collective bargaining agreements.

Congress could never have dreamed anyone would argue – or that a court would accept – that it intended to make illegal under § 302 the very same labor-management agreements it made enforceable under § 301(a). Because § 302(c), 29 U.S.C. § 186(c), contains no explicit exceptions for collective bargaining agreements or any other labor agreements between employers and unions, the Eleventh Circuit's view of § 302 would make every collective bargaining agreement an illegal "payment" of a "thing of value."

III. THE SPECIFIC PROVISIONS OF THIS NEUTRALITY AGREEMENT ALLEGED TO BE ILLEGAL ARE COMMONPLACE AND HAVE NEVER PREVIOUSLY BEEN QUESTIONED UNDER SECTION 302.

The destabilizing effect of the Eleventh Circuit's decision is strongly demonstrated when each provision of the neutrality agreement that Plaintiff alleges to be illegal is considered separately. Each has been approved and occupies a long-standing and well-established place in labor law.[2]

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[2] The provisions Plaintiff attacks are similar or identical to those in many contracts existing around the time Congress adopted § 302, but the legislative history of the Taft-Hartley amendments lacks any suggestion these were being outlawed. *See* COLLECTIVE BARGAINING CONTRACTS: TECHNIQUES OF NEGOTIATION AND ADMINISTRATION WITH TOPICAL CONTRACT CLAUSES (BNA, 1941), at 149 (presenting clauses giving unions access to bulletin boards); *id.* at 586 ("In many agreements union representatives are granted the right to visit the plant at any time

(Continued on following page)

Neutrality. Employers have a right of free speech under § 8(c) of the NLRA, 29 U.S.C. § 158(c). This provision was added by the Taft-Hartley amendments, at the same time as § 302. *See Chamber of Commerce*, 554 U.S. at 67. "We have characterized this policy judgment, which suffuses the NLRA as a whole, as 'favoring uninhibited, robust, and wide-open debate in labor disputes,' stressing that 'free-wheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the NLRB.'" *Id.* at 68 (quoting *Letter Carriers v. Austin*, 418 U.S. 264, 272-73 (1974)). Employers may oppose unionization, but they can also speak in favor,

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without special permission from the employer."); Prentice-Hall, 4 *Labor Equipment*, "Union Contracts and Collective Bargaining" (Prentice-Hall 1946) at Para. 53,280 ("Union Activities in the Plant" notes 60% of several thousand contracts surveyed had clauses allowing union access to company bulletin boards and 24% allowed outside union representatives access to the facility); *id.* at Para. 53,352 ("contracts frequently contain the equivalent of what in international relations is referred to as a non-aggression pact. In the field of labor relations, these mutual pledges are something called non-discrimination or harmony clauses. . [T]hese clauses contain: . . . mutual pledges by employer and union not to engage in antagonistic propaganda."); *id.* at Para. 56,754.6 (companies agree with United Auto Workers to provide lists of employee names and addresses). *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 659 (1982) (prevalence of subcontracting clauses in construction-industry collective bargaining agreements relevant to interpreting Congress's intent in passing NLRA Section 8(e), 29 U.S.C. § 158(e)); *BASF Wyandotte Corp. v. Local 227, Int'l Chem. Workers Union*, 791 F.2d 1046, 1050 (2d Cir. 1986) (congressional silence about existing contracting practices significant in construing § 302).

NLRB v. O'Keefe & Merritt Mfg. Co., 178 F.2d 445, 447-48 (9th Cir. 1950); *Coamo Knitting Mills*, 150 N.L.R.B. 579, 581-82 (1964), or stay neutral, *Kimbrell v. NLRB*, 290 F.2d 799, 801-02 (4th Cir. 1961). Under the neutrality agreement at issue here, the employer agreed to stay neutral and not try to influence its employees' decisions. An employer is not required to speak against unionization. Requiring it to do so – on threat of criminal sanction – is inimical to the free-speech policy "which suffuses the NLRA." Moreover, an employer may not be forced to do so constitutionally:

> Among the frequently litigated issues under the Wagner Act were charges that an employer's attempts to persuade employees not to join a union – or to join one favored by the employer rather than a rival – amounted to a form of coercion prohibited by § 8. The NLRB took the position that § 8 demanded complete employer neutrality during organizing campaigns, reasoning that any partisan employer speech about unions would interfere with the § 7 rights of employees. See 1 J. Higgins, The Developing Labor Law 94 (5th ed. 2006). In 1941, this Court curtailed the NLRB's aggressive interpretation, clarifying that nothing in the NLRA prohibits an employer "from expressing its view on labor policies or problems" unless the employer's speech "in connection with other circumstances [amounts] to coercion within the meaning of the Act." *NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469, 477, 62 S.Ct. 344, 86 L.Ed. 348. We

> subsequently characterized Virginia Electric as recognizing the First Amendment right of employers to engage in noncoercive speech about unionization. *Thomas v. Collins*, 323 U.S. 516, 537-538, 65 S.Ct. 315, 89 L.Ed. 430 (1945).

Chamber of Commerce, 554 U.S. at 66-67. *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *W.Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). "[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796-97 (1988) (emphasis in original). The decision below violates this right not to speak by threatening civil and criminal punishment of employers who choose not to speak against unionization and are not afraid to promise neutrality.

Union access. Under the NLRA, employers can exclude union organizers from their property in most instances. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 535-38 (1992). In some circumstances, however, they can be required to let them on the premises. *Id.* at 539-540. Employers can also agree to permit access, and when they do so, the agreement is binding and enforceable. *Lion Dry Goods*, 369 U.S. at 20 n.4; *Beverly Health v. NLRB*, 317 F.3d 316, 322 (D.C. Cir. 2003); *Unbelievable, Inc. v. NLRB*, 71 F.3d 1434, 1438-39 (9th Cir. 1995); *Facet Enters., Inc. v. NLRB*, 907 F.2d 963, 983 (10th Cir. 1990) (plant access among the "important areas of labor-management relations"); *Great*

Western Coca-Cola Bottling Co., 740 F.2d at 402-04; *Boyer Bros.*, 217 N.L.R.B. 342, 344 (1975); *Precision Anodizing & Plating*, 244 N.L.R.B. 846, 856 (1979). This longstanding doctrine, *see supra*, n.2, would be legally impossible if providing access to a union were "delivering" or "paying" a "thing of value" and a § 302 violation.

Employees' names and addresses. The NLRB has long required employers to supply lists of names and addresses of employees eligible to vote in union elections, following *Excelsior Underwear Inc.*, 156 N.L.R.B. 1236 (1966). It adopted this approach in order to benefit employees by opening up communication. *Id.* at 1240. This Court approved in *NLRB v. Wyman-Gordon Co.*, *supra*, 394 U.S. 759, rejecting the notion that such a requirement was somehow unlawful: "The respondent [employer] also argues that it need not obey the Board's order because the requirement of disclosure of employees' names and addresses is substantively invalid. This argument lacks merit." *Id.* at 767. One challenge rejected by the Court was that the provision of names and addresses would violate § 302. *See* Brief for Wyman-Gordon Company to the Supreme Court, *NLRB v. Wyman-Gordon Co.* (No. 463), 1969 WL 120290, at 38-44; *Wyman-Gordon Co. v. NLRB*, 397 F.2d 394, 396 (1st Cir. 1968) ("[W]e are not greatly impressed by the contention that compelling a list of names and addresses forces appellant . . . to give a 'thing of value' to a labor organization, in violation of 29 U.S.C. § 186.").

A union is also entitled to get employee information – including names and addresses – from an employer pursuant to the bargaining duty imposed once a union is recognized as the employees' collective bargaining representative. This was the law before enactment of § 302. *Aluminum Ore Co. v. NLRB*, 131 F.2d 485, 487 (7th Cir. 1942) (enforcing Board order requiring employer to provide names, classifications and wages; rejecting employer's argument that the information was confidential). It has never been doubted since then. *See Yawman & Erbe Mfg. Co.*, 89 N.L.R.B. 881, 883 (1950), *enforced, NLRB v. Yawman & Erbe Mfg. Co.*, 187 F.2d 947 (2d Cir. 1951); *Leland-Gifford Co.*, 95 N.L.R.B. 1306, 1310 (1951), *enforced in rel. part, NLRB v. Leland-Gifford Co.*, 200 F.2d 620 (1st Cir. 1952); *Hearst Corp.*, 102 N.L.R.B. 637, 638 (1953); *Verona Dyestuff Division Mobay Chemical Corp.*, 233 N.L.R.B. 109, 112 (1977); *Masonic Hall*, 261 N.L.R.B. 436, 439 (1982); *Maple View Manor, Inc.*, 320 N.L.R.B. 1149, 1149-50 (1996), *enforced mem.*, 107 F.3d 923 (D.C. Cir. 1997); *Stanford Hosp. & Clinics*, 338 N.L.R.B. 1042, 1042-43 (2003), *enforcement denied on other grounds by, Stanford Hosp. & Clinics v. NLRB*, 370 F.3d 1210, 1211 (D.C. Cir. 2004); *Beverly Health & Rehabilitation Services*, 346 N.L.R.B. 1319, 1326 (2006). There is no exemption from § 302(a)(2) under § 302(c) for providing this information, although it is seen as "presumptively relevant" to the performance of the union's bargaining duty on behalf of employees. *In Re Baker Concrete Const., Inc.*, 338 N.L.R.B. No. 48 (Oct. 28, 2002), slip op. at 2. Indeed, *all* information an employer is

required to give a union as part of the bargaining process under the Court's decision in *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149 (1956) has some "value." Yet that obligation – not one expressed in the statute at all but drawn from the general duty to bargain – is not made an exemption under Section 302(c).

By considering agreements for employer neutrality, worksite access, and the provision of employee lists to be the "payment" of "things of value," the Eleventh Circuit calls into question decades of settled precedent.

IV. THE ELEVENTH CIRCUIT DECISION THREATENS TO UNDERMINE VOLUNTARY RECOGNITION.

The complaint does not allege that the employer's promise to recognize the union upon a showing of a majority status – without an NLRB election – violates § 302. Yet this is the very object of the neutrality agreement. It does not confer recognition on the union as the bargaining agent of any employees and does not entitle it to receive dues or any other payments from employees. A neutrality agreement only provides a process through which a union might in the future obtain the support of a majority of the employees and gain recognition. *New Otani Hotel*, 331 N.L.R.B. 1078, 1080-81 (2000). The agreement's provisions allowing for facility access, requiring employer neutrality, and entitling the union to employee

names and addresses are only means to this end. They have no independent benefit or value to a union.

There is no market for a neutrality agreement or for its constituent provisions. The union cannot trade or sell them. They do not give the union the right to receive any employee payments, so there is nothing in them to assign or pledge. The union cannot derive any present value from them. "Congress clearly intended § 302's 'thing of value' to have at least some ascertainable value. In this case, unquestionably, the concessions made by [the employer] . . . have no such value whatsoever." *Adcock*, 550 F.3d at 375; *Sage Hospitality*, 390 F.3d at 219 ("[A]ny benefit to the union inherent in a more efficient resolution of recognition disputes does not constitute a 'thing of value' within the meaning of the statute.").

Plaintiff did not allege, and the Eleventh Circuit did not find, that the employer's agreement to voluntarily recognize the union without an NLRB election violates § 302. Surely, Plaintiff did not do so because the law is so clear that this has always been allowed under the NLRA. A union must show the support of a majority of employees before it may be recognized as the exclusive representative. *ILGWU v. NLRB (Bernhard-Altmann Texas Corp.)*, 366 U.S. 731, 738 (1961). This requirement may be satisfied by the union's presentation of authorization cards signed by a majority of employees. This Court stated in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 600 (1969), "[i]n short, we hold that the 1947 amendments did not restrict an employer's duty to bargain under Section

8(a)(5) solely to those unions whose representative status is certified after a Board election." The Court thoroughly analyzed the issue and concluded that union authorization cards could lawfully be used to support recognition. 395 U.S. at 596-600 & n.17; *see Bernhard-Altmann Texas Corp.*, 366 U.S. at 737 ("If an employer takes reasonable steps to verify union claims [of majority status] . . . he can readily ascertain their validity and obviate a Board election."); *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 280 (1973); *Broad Street Hosp.*, 452 F.2d at 305 ("a voluntary recognition by employers of bargaining units would be discouraged, and the objectives of our national labor policy thwarted, if recognition were to be limited to Board-certified elections. . . ."); *Georgetown Hotel v. NLRB*, 835 F.2d 1467, 1470-71 (D.C. Cir. 1987); *NLRB v. Lyon & Ryan Ford*, 647 F.2d 745, 750 (7th Cir. 1981) ("An employer's voluntary recognition of a majority union remains 'a favored element of national labor policy.'"), *cert. denied*, 102 S.Ct. 391 (1981); *NLRB v. Broadmoor Lumber Co.*, 578 F.2d 238, 241 (9th Cir. 1978) (same). In Section 9(c)(1)(A)(i) of the Act, 29 U.S.C. § 159(c)(1)(A)(i), Congress provided that employees may file a petition for an election if "their employer declines to recognize their representative." This language makes unmistakably clear that Congress recognized – and even preferred – the practice of voluntary recognition and that a Board-supervised election is necessary only when an employer declines.

The complaint and the Eleventh Circuit's decision divorce specific provisions of the neutrality agreement from the agreement's purpose. The provisions of the neutrality agreement that the Eleventh Circuit found potentially criminal under § 302 are simply means to the end of voluntary recognition. If these provisions are the illegal payment of things of value under § 302, then the voluntary recognition requirement at the agreement's heart must be too. But there is no room in decades of established case law for Plaintiff's assertion that an agreed-upon process for fostering voluntary recognition should suddenly be regarded as criminal.

The use of a card-check procedure – voluntary recognition without resort to an NLRB-sponsored election – has been specifically recommended to improve union-management relationships. The Commission on the Future of Worker Management Relations, chaired by President Ford's Secretary of Labor, John T. Dunlop, stated in its 1995 report: "We encourage employers and unions who desire a cooperative relationship to agree to determine the employees' preference via a 'card check.'" U.S. Commission on the Future of Worker-Management Relations, Final Report (1994), *Federal Publications*, Paper 2, at 42.[3] The Commission explained that "[c]ard check agreements build trust between union and employer and avoid

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[3] http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1004 &context=key_workplace.

expending public and private resources on unnecessary election campaigns." *Id.* If the Eleventh Circuit is correct, Secretary Dunlop's Commission was advocating an illegal act.

Accepting the Eleventh Circuit's reasoning would revolutionize, and upset, the fundamental understanding of the recognition process under the NLRA that has persisted since its enactment and through the Taft-Hartley amendments and the Landrum-Griffin Act, 29 U.S.C. § 401 *et seq.*

V. THE FACT THAT THE UNION LOBBIED FOR FAVORABLE LEGISLATION IS IRRELEVANT: BOTH THE ACT AND THE PETITION CLAUSE FAVOR LABOR-MANAGEMENT COOPERATION.

The Eleventh Circuit found it relevant, and apparently suspect, that the union lent its "financial support to a ballot initiative regarding casino gaming." App. 3, 8. There is no question that the union wanted the neutrality agreement enough to give up its right to take economic action against the employer and to expend resources helping the employer get into the casino business. The question under § 302, however, is not whether the union wants something from the employer but whether it is the type of thing that Congress intended to stop. Sixty-five years of jurisprudence before the Eleventh Circuit's decision shows the opposite: this kind of agreement is something the NLRA is designed to encourage.

The NLRA was designed to promote labor-management cooperation. Its policy is "encouraging the practice and procedure of collective bargaining." 29 U.S.C. § 151; *Auciello Iron Works*, *supra*, 517 U.S. at 785 ("The object of the National Labor Relations Act is industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes between workers and employees."). The Act is "designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers." *NLRB v. Am. Nat. Ins. Co.*, 343 U.S. 395, 401-02 (1952). "The overriding policy of the NLRA is 'industrial peace.'" *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38 (1987) (internal citation omitted). "The central purpose of the Act was to protect and facilitate employees' opportunity to organize unions to represent them in collective-bargaining negotiations." *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 609 (1991). *See also* Labor Management Cooperation Act, 29 U.S.C. § 175a. Neutrality agreements are a prominent way of accomplishing this. *Dana Corporation*, 356 N.L.R.B. No. 49 (2010), slip op. at 7-8.

The notion that unions and employers commit criminal offenses by helping each other is antithetical to the NLRA's basic premise. The employer always receives consideration for a neutrality agreement. The one here, like those in all the court and NLRB cases on the subject, has a prohibition against picketing and other disruptive labor actions – valuable

consideration for a fledgling business. The existence of such consideration does not make a neutrality agreement illegal. This makes it enforceable under the common law of contracts and under § 301(a). *Lion Dry Goods*, 368 U.S. at 28.

The Union did not make any promise in the agreement that it would do anything to support legislation allowing the employer to have slot machines.[4] The neutrality agreement makes the employer's ability to have slot machines a condition precedent to the agreement becoming effective. App. 85, ¶ 15. It was thus in the union's *self-interest* to lobby for legalization of slot machines, which it did. *See Mulhall I*, App. 38. If it were successful, which it was, the agreement would become effective and the employer would let the union *try* to organize its employees without hindrance. This condition was explicit, not hidden, and was entirely logical and benign.

If it is sound logic that a union's help for the employer's business can make a labor-management agreement criminal, then a new era of labor relations is ushered in. Unions try to help their employers all

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[4] The allegation in Paragraph 11 of the complaint that the union "agreed to expend monetary and other resources to support a ballot proposition favored by Mardi Gras" does not meet *Twombly/Iqbal* standards. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *see Mulhall II*, App. 11-12 (Restani, J., dissenting). No facts were alleged to support this conclusion. It is belied by the text of the neutrality agreement itself.

the time, and, of course, they expect benefits in return, both in the form of more and better jobs for their members (or at least not losing them) and in a cooperative attitude in collective bargaining. When they do so by lobbying for mutually beneficial legislation, their conduct is not unlawful; it is protected by the Petition Clause. *United Mine Workers v. Pennington*, 381 U.S. 657, 670-71 (1965) (joint union-employer lobbying for minimum wage that would favor large employers signed to union's agreement could not violate antitrust law); *Brown & Root, Inc. v. Louisiana State AFL-CIO*, 10 F.3d 316, 325-26 (5th Cir. 1994) (First Amendment barred NLRA § 303 challenge to unions' lobbying for legislation sought by company in return for dismissal of nonunion subcontractor); *Franchise Realty Interstate Corp. v. San Francisco Local Jt. Exec. Bd. of Culinary Workers*, 542 F.2d 1076, 1080 (9th Cir. 1976) (joint lobbying by restaurant association and labor union protected under *Noerr-Pennington* doctrine); *see, e.g.*, Juliet Eilperin & Steven Mufson, "Obama's Allies' Interests Collide Over Keystone Pipeline," *The Washington Post*, October 16, 2011 (noting lobbying for Keystone Pipeline project by unions who had entered into labor agreement with project's developer).[5] Once again, the Eleventh Circuit's approach proves too much. If a labor-management agreement can be tainted by a

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[5] http://www.washingtonpost.com/national/health-science/obama-allies-interests-collide-over-keystonepipeline/2011/10/11/gIQAr09cpL_story.html.

union's lobbying for mutually beneficial legislation, why not a collective bargaining agreement or any other form of labor-management cooperation?

Because the whole purpose of the neutrality agreement here is to foster the twin aims of the NLRA – the avoidance of labor disputes and the promotion of collective bargaining – the agreement cannot be condemned by § 302.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD G. MCCRACKEN*
ANDREW J. KAHN
PAUL L. MORE
DAVIS, COWELL & BOWE LLP
595 Market Street, Suite 1400
San Francisco, CA 94105
(415) 597-7200
rmccracken@dcbsf.com

Counsel for Petitioner

**Counsel of Record*

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 11-10594

D.C. Docket No. 0:08-cv-61766-PAS

MARTIN MULHALL,

Plaintiff-Appellant,

versus

UNITE HERE LOCAL 355,
HOLLYWOOD GREYHOUND TRACK, INC.,
doing business as Mardi Gras Gaming,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(January 18, 2012)

Before WILSON and FAY, Circuit Judges, and RESTANI,* Judge.

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* Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

WILSON, Circuit Judge:

On this appeal, we decide whether organizing assistance offered by an employer to a labor union can be a "thing of value" contemplated under § 302 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186. Section 302 makes it unlawful for an employer to give or for a union to receive any "thing of value," subject to limited exceptions. We hold that organizing assistance can be a thing of value that, if demanded or given as payment, could constitute a violation of § 302. Because the dismissal of Martin Mulhall's complaint was based on a contrary conclusion, we reverse.

I. BACKGROUND[1]

Hollywood Greyhound Track, Inc., d/b/a Mardi Gras Gaming ("Mardi Gras"), and UNITE HERE Local 355 ("Unite"), a labor union, entered into a memorandum of agreement ("Agreement") on August 23, 2004. In the Agreement, Mardi Gras promised to (1) provide union representatives access to non-public work premises to organize employees during non-work hours; (2) provide the union a list of employees, their job classifications, departments, and addresses; and (3) remain neutral to the unionization of employees. In return,

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[1] We present the facts in the light most favorable to the plaintiff and accept all factual allegations as true in reviewing Federal Rule of Civil Procedure 12(b)(6) dismissals. *Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003) (per curiam).

Unite promised to lend financial support to a ballot initiative regarding casino gaming. Ultimately, Unite spent more than $100,000 campaigning for the ballot initiative. Additionally, if recognized as the exclusive bargaining agent for Mardi Gras's employees, Unite promised to refrain from picketing, boycotting, striking, or undertaking other economic activity against Mardi Gras.

Mulhall is a Mardi Gras employee opposed to being unionized. His complaint seeks to enjoin enforcement of the Agreement, contending that it violated § 302. The district court dismissed the complaint for failure to state a claim because it found that the assistance promised in the Agreement cannot constitute a "thing of value" under § 302.

This is not the first time this case has been before us on appeal. In a previous appeal addressing Mulhall's standing to bring the case, we stated that Mulhall "adequately alleged that the organizing assistance promised by Mardi Gras in the [Agreement] is valuable, and indeed essential, to Unite's effort to gain recognition." *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1288 (11th Cir. 2010).

II. STANDARD OF REVIEW

An order granting a motion to dismiss for failure to state a claim is subject to de novo review. *See Redland Co. v. Bank of Am. Corp.*, 568 F.3d 1232, 1234 (11th Cir. 2009) (per curiam).

III. DISCUSSION

Congress enacted the LMRA, commonly known as the Taft-Hartley Act, to curb abuses "inimical to the integrity of the collective bargaining process." *Arroyo v. United States*, 359 U.S. 419, 425, 79 S. Ct. 864, 868 (1959). With certain exceptions, § 302 makes it unlawful for

> any employer . . . to pay, lend, or deliver, any money or other thing of value . . . to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer. . . .

29 U.S.C. § 186(a)(2). Additionally, a person cannot request or demand a payment, loan, or delivery of money or other thing of value. *Id.* at § 186(b)(1). As the Ninth Circuit explained, "The dominant purpose of § 302 is to prevent employers from tampering with the loyalty of union officials and to prevent union officials from extorting tribute from employers." *Turner v. Local Union No. 302, Int'l Bhd. of Teamsters*, 604 F.2d 1219, 1227 (9th Cir. 1979).

In the context of § 302, the Eleventh Circuit has not addressed the meaning of the phrase "thing of value," but it has commented on the phrase as it is used in various other criminal statutes. In *United States v. Nilsen*, the Court stated, "Congress' frequent use of 'thing of value' in various criminal statutes has evolved the phrase into a term of art which the courts generally construe to envelop[ ] both tangibles and

intangibles." 967 F.2d 539, 542 (11th Cir. 1992) (per curiam) (discussing 18 U.S.C. § 876, a statute criminalizing the making of a threatening letter with the intent to extort a thing of value). Reasoning that "monetary worth is not the sole measure of value," we held the expected testimony of a key government witness is a thing of value. *Id.* at 543.

The Fourth and Third Circuits have addressed challenges to neutrality and cooperation agreements under § 302, and both courts found the assistance was not a thing of value. *Adcock v. Freightliner LLC*, 550 F.3d 369, 374 (4th Cir. 2008); *Hotel Emps. & Rest. Emps. Union, Local 57 v. Sage Hospitality Res., LLC*, 390 F.3d 206, 219 (3d Cir. 2004). In *Adcock*, the plaintiff challenged an agreement in which the employer (1) granted the union access to private property, (2) promised neutrality during organizing campaigns, and (3) required some employees to attend union presentations on paid company time. 550 F.3d at 371. The Fourth Circuit concluded the organizing assistance had no ascertainable value, and therefore the plaintiff had failed to state a § 302 claim. *Id.* at 374. The court explained that the reading of § 302 was consistent with the purpose of the statute because the agreement could not be construed as a bribe or corrupt practice. *Id.* at 375.

The Third Circuit reviewed a neutrality agreement and held that, regardless of whether the agreement benefitted an employer and a union, there was no § 302 violation because the organizing assistance does not qualify as a payment, loan, or delivery. *Sage*

Hospitality Res., LLC, 390 F.3d at 219. The court also reasoned that any benefit "inherent in a more efficient resolution of recognition disputes does not constitute a 'thing of value' within the meaning of the statute." *Id.* Moreover, the court expressed concern that invalidating the suspect agreement for a § 302 violation would upset the balance of laws governing the recognition of unions. *Id.*

No other circuit has published an opinion involving the precise facts presented on this appeal, but several have addressed what the term "thing of value" means in the § 302 context. The Sixth Circuit rejected the argument that under § 302 "a thing of value" is restricted to things of monetary value. *United States v. Douglas*, 634 F.3d 852, 858 (6th Cir.), *cert. denied*, 131 S. Ct. 3039 (2011). In that case, General Motors gave high paying jobs to non-qualified relatives of union officials. The court found a violation of the statute occurred even though the thing of value was not money or some other tangible thing. *Id.*

The Second Circuit commented on the scope of the phrase "thing of value" when it explained that "[v]alue is usually set by the desire to have the 'thing' and depends upon the individual and the circumstances." *United States v. Roth*, 333 F.2d 450, 453 (2d Cir. 1964) (holding that a loan is a thing of value under § 302). It recommended that common sense should inform determinations of whether an improper benefit has been conferred.

> [I]t may be argued that a five-dollar Christmas tie is a "thing of value" and a Christmas present hopefully is to create good will in the recipient towards the donor. Countless hypothetical cases can be put, each on its facts approaching that evanescent borderline between the proper and the improper. No calculating machine has yet been invented to make these determinations with certainty. In the meantime the courts must rely upon the less mechanical judgment and common sense which under the present system is, and of necessity must be, lodged in judges and juries.

Id. at 454. We are inclined to agree that, in circumstances like these where we search for the line between the proper and the improper, we must rely upon our common sense.

It seems apparent that organizing assistance can be a thing of value, but an employer does not risk criminal sanctions simply because benefits extended to a labor union can be considered valuable. Violations of § 302 only involve payments, loans, or deliveries, 29 U.S.C. § 186(a)-(b), and every benefit is not necessarily a payment, loan, or delivery. For example, intangible organizing assistance cannot be loaned or delivered because the actions "lend" and "deliver" contemplate the transfer of tangible items.

Yet, a violation of § 302 cannot be ruled out merely because intangible assistance cannot be loaned or delivered. Section 302 also prohibits payment of a

thing of value, and intangible services, privileges, or concessions can be paid or operate as payment. Whether something qualifies as a payment depends not on whether it is tangible or has monetary value, but on whether its performance fulfills an obligation. If employers offer organizing assistance with the intention of improperly influencing a union, then the policy concerns in § 302 – curbing bribery and extortion – are implicated.

It is too broad to hold that all neutrality and cooperation agreements are exempt from the prohibitions in § 302. Employers and unions may set ground rules for an organizing campaign, even if the employer and union benefit from the agreement. But innocuous ground rules can become illegal payments if used as valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer.

We need not address whether we require a "thing of value" to have monetary value. Here, Mulhall alleged and a jury could find that Mardi Gras's assistance had monetary value. As evidence of the value, Mulhall points to the $100,000 Unite spent on the ballot initiative that was consideration for the organizing assistance. Mulhall's allegations are sufficient to support a § 302 claim.

We also are unpersuaded by arguments that either the rule of lenity or concerns about constitutionally protected speech counsel against allowing neutrality agreements to be covered by § 302. The rule of lenity applies only when a statute is ambiguous,

Salinas v. United States, 522 U.S. 52, 66, 118 S. Ct. 469, 478 (1997), and here, the plain language of the statute is clear. The protected speech concerns arise out of a mistaken understanding that employers will be required to actively oppose unionization in order to avoid criminal sanctions under § 302. As we see it, an employer's decision to remain neutral or cooperate during an organizing campaign does not constitute a § 302 violation unless the assistance is an improper payment. If the assistance is not an improper payment, an employer's speech is not limited, and it may choose to oppose unionization.

Consequently, we find that Mulhall has stated a claim for relief, and we remand so that the district court can consider the § 302 claim and determine the reason why Unite and Mardi Gras agreed to cooperate with one another.

REVERSED AND REMANDED.

RESTANI, Judge, dissenting:

I respectfully dissent. I conclude that the reasoning of our sister circuits is correct. *See Adcock v. Freightliner LLC*, 550 F.3d 369 (4th Cir. 2008); *Hotel Emps. & Rest. Emps. Union, Local 57 v. Sage Hospitality Res. LLC*, 390 F.3d 206, 218-19 (3d Cir. 2004). Therefore, I would affirm the dismissal granted by the District Court.

I also write because I do not agree that an improper intent on behalf of the union or employer in

demanding or offering the types of concessions at issue here transforms an otherwise "innocuous" concession into a bribe or constitutes extortion in violation of § 302 of the Labor Management Relations Act ("LMRA"). Mulhall has not alleged that Mardi Gras offered these concessions as a bribe.[1] Thus, I put this issue aside and focus on whether a union that demands these types of concessions with an improper intent commits extortion and thereby runs afoul of § 302.

Adding the element of intent is a non-starter because to do so conflicts with the purpose of the LMRA regardless of whether the focus is the concessions or the intent behind them. Unions demand these types of concessions, and may threaten to cause disruptions if the concessions are not given. The purpose is to make it easier to achieve collective bargaining rights on behalf of the target employees. The LMRA is designed to promote both labor peace and collective bargaining. *See Adcock*, 550 F.3d at 375 (citing *Arroyo v. United States*, 359 U.S. 419, 425

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[1] Mulhall's complaint states that "it is not alleged that Mardi Gras has violated § 302(a)(2) because it has not delivered the Information, Access, or Gag Clause demanded by Local 355." Rec. Ex. at 14, ¶ 38, ECF No. 12. According to the complaint, it is not the formation of the Agreement that violated § 302 but Unite's demand and request that the Agreement be enforced. *Id.* at ¶ 37. To the extent bribery is at issue, I agree with *Adcock* that "[b]y no stretch of the imagination are the concessions a means of bribing representatives of the Union[.]" 550 F.3d at 375.

(1959)) (noting the purpose behind § 302 is to promote "the integrity of the collective bargaining process"). The LMRA cannot promote collective bargaining and, at the same time, penalize unions that are attempting to achieve greater collective bargaining rights.

Even if the union has some other aim besides achieving collective bargaining rights (such as obtaining more members and dues without ever promoting the interest of the employees), such conduct implicates the union's duty to its members, not the collective bargaining process between the employer and the union. In such a situation, employees can decline to join the union and union members can leave the union or seek their own judicial remedies. We should not, however, turn § 302 upside down to protect against possible disadvantages resulting from some union actions.

Moreover, under the majority's holding, § 302 is not implicated unless the concessions at issue are "used as valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer." Maj. Op. at 9. Thus, at the pleading stage, the complaint must contain sufficient factual allegations showing the union demanded these concessions as extortion or were offered by the employer as a bribe, and not just as regular ground rules of organizing.

Here, Mulhall's complaint makes no allegations of wrongdoing relating to the formation of the Agreement or Unite's motives at the time of contracting. *See* Rec. Ex. at 7-8, ¶ 7-11, ECF No. 12. Mulhall

merely alleges that unions, in general, have or may have improper motives when negotiating for these concessions. Rec. Ex. at 12, ¶ 28 ("Unions have made, and are liable to make, wage, benefit, and other concessions at the expense of employees they exclusively represent in collective bargaining in exchange, *quid pro quo*, for things of value from employers. . . ."). Such general allegations are insufficient under our pleading standards. Thus, even under the majority's theory, Mulhall's complaint fails to state a cause of action and should be dismissed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 08-61766-CIV-SEITZ/O'SULLIVAN

MARTIN MULHALL,

Plaintiff,

v.

UNITE HERE LOCAL 355,
HOLLYWOOD GREYHOUND TRACK,
INC., d/b/a MARDI GRAS GAMING,

Defendants.
_____/

ORDER GRANTING MOTION TO DISMISS

(Filed Jan. 24, 2011)

THIS MATTER came before the Court upon Defendant Unite Here Local 355's Motion to Dismiss [DE-40]. This action arises from Defendants, Hollywood Greyhound Track (Mardi Gras) and Unite Here Local 355's (Unite Here) organizing concessions agreement (MOA) to which Plaintiff (Mulhall) is not a party. Mulhall seeks an injunction under § 302 of the Labor Management Relations Act (LMRA) prohibiting Unite Here from demanding or receiving from Mardi Gras "things of value" in the form of organizing assistance, namely his employee information, access to non-public areas such as employee break rooms during non-work hours, and employer neutrality to unionization. Because the assistance promised in the MOA does not constitute a thing of value, Unite Here's Motion to Dismiss is granted.

I. Background

Mardi Gras maintains a dog track at which Mulhall has worked as a paramutual clerk and groundskeeper for forty years. In an effort to establish a gaming facility, Mardi Gras executed the MOA in 2004 with Unite Here, the local hospitality services union. The MOA exchanged Unite Here's support for Mardi Gras's gaming license campaign and labor peace for three labor organizing concessions: (1) Mardi Gras must provide union representatives access to "non-public" work premises to organize employees during non-work hours; (2) Mardi Gras must provide the union a list of employees, their job classifications, departments, and addresses; and (3) Mardi Gras must remain neutral to the unionization of employees. (*See* MOA at DE-1 at 14-18, ¶¶ 4, 7, 8, 11.) With these concessions, Unite Here may more successfully campaign Mardi Gras's employees to organize. If a majority of employees elect Unite Here pursuant to the MOA's "card check" election procedure, Mardi Gras must recognize Unite Here as the employees' exclusive bargaining representative. (*See* MOA ¶ 9.)

In 2006, Mardi Gras began operating its gaming facility, and, pursuant to the MOA, provided Unite Here employee information lists in 2006 and 2007, neither of which contained Mulhall's information. In 2008, Mardi Gras refused to provide Unite Here any employee information and, after Mardi Gras ignored requests to arbitrate the issue, Unite Here brought suit to compel arbitration. In response, Mardi Gras argued that the MOA was *void ab initio* because it

promised things of value to Unite Here. The Court ordered arbitration and the arbitrator entered an award finding that the MOA was enforceable. On August 6, 2010, the arbitration award was confirmed in relevant part.

On November 4, 2008, Mulhall sued both Mardi Gras and Unite Here to enjoin enforcement of the MOA, and on November 21, 2008, Unite Here moved to dismiss or stay his action. On April 22, 2009, the Court granted Unite Here's Motion to Dismiss based on Plaintiff's lack of standing. Subsequently, Mulhall appealed and the Eleventh Circuit, finding that Mulhall has standing, remanded the case to this Court for further proceedings. The Eleventh Circuit explicitly noted that it was not addressing whether an individual, like Mulhall, had a private right of action under § 302 of the LMRA or whether the organizing assistance provided by Mardi Gras under the MOA constitutes a "thing of value" under the statute. Thereafter, Unite Here filed the instant Motion to Dismiss.

II. Analysis

Unite Here moves to dismiss Mulhall's complaint because his sole basis for relief is his claim that the concessions provided to Unite Here in the MOA are a "thing of value" and thus prohibited by § 302. Unite Here asserts that the concessions Mardi Gras provided to Unite Here under the MOA do not constitute a "thing of value," as that term is used in the LMRA,

29 U.S.C. § 186, also known as § 302.[1] Section 302 of the LMRA states, in relevant part:

> (a) . . . It shall be unlawful for any employer . . . pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value –
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or
>
> (3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

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[1] Unite Here also moves to dismiss because § 302 does not provide Mulhall with a private right of action. The Court finds that it need not address whether a private right of action exists under the statute because the MOA did not provide Unite Here with a "thing of value."

> (b) . . . (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

29 U.S.C. § 186. Unite Here submits that Mardi Gras did not "pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value" to Unite Here. Thus, Unite Here asserts that the complaint should be dismissed.

While the Eleventh Circuit has not directly addressed what constitutes a "thing of value" under § 302 of the LMRA, two other Circuit Courts have. In *Adcock v. Freightliner, LLC*, 550 F.3d 369 (4th Cir. 2008), the Fourth Circuit considered whether a card check agreement, wherein the employer agreed to: (1) require some of its employees to attend, on paid company time, union presentations explaining the card check agreement; (2) provide the union reasonable access to non-work areas in company plants to allow union representatives to meet with employees; and (3) refrain from making negative comments about the Union during organizing campaigns, violated § 302. The Fourth Circuit held that none of these things constituted a "thing of value" under the plain language of the statute. *Id.* at 374. The Fourth Circuit reasoned that all of these things involved giving the union access to employees during an organizing campaign and did not involve the delivery of either tangible or intangible items to the union. *Id.*

The Fourth Circuit further noted that such a reading of the statute was buttressed by the statute's penalty provision, in which the severity of the penalty is dictated by the monetary value of the thing delivered by the employer or received by the union. *Id.* at 375. Therefore, the Fourth Circuit concluded that "Congress clearly intended § 302's 'thing of value' to have at least some ascertainable value" and that access to employees clearly has no such ascertainable value. *Id.*

The Third Circuit came to a similar conclusion in *Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC*, 390 F.3d 206 (3d Cir. 2004), where it upheld the district court's decision that an employer's promises of neutrality, granting the union access to the employer's facility, and provision of employee list in return for a union's no-strike commitment did not constitute a "thing of value" under § 302. *See Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC*, 299 F. Supp. 2d 461, 465 (W.D. Pa. 2003) for details regarding content of agreement. In reaching their conclusions, both the Fourth Circuit and the Third Circuit also considered the purpose behind Congress's enactment of § 302. The Third Circuit, quoting *Arroyo v. U.S.*, 359 U.S. 419, 425-26 (1959), noted that "[w]hen Congress enacted section 302, it was 'concerned with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse by union officers of

the power which they might achieve if welfare funds were left to their sole control.'" *Sage*, 390 F.3d at 218; *see also Adcock*, 550 F.3d at 375 (noting that § 302 is aimed at preventing bribery, extortion, and other corrupt practices conducted in secret) (quotation and citation omitted). The Fourth Circuit found that concessions that permitted union access to employees were "by no stretch of the imagination" a means of bribing union representatives and clearly no union representative would personally benefit from such concessions. *Adcock*, 550 F.3d at 375.

Both *Adcock* and *Sage* involved very similar concessions to the ones at issue in the instant case – access to employees and employee lists and neutrality – and the Circuit Courts found such concessions did not violate § 302. Further, the purpose behind § 302, as discussed in *Adcock* and *Sage* are met here. There is no indication of corruption or bribery of Unite Here officials. In fact, none of the concessions directly benefitted any individual union official or union employee. Consequently, based on *Adcock* and *Sage*, Mulhall has failed to allege a violation of § 302.

Notwithstanding *Adcock* and *Sage*, Mulhall makes several arguments that he has adequately pled that Unite Here's access to non-public work areas, employee lists, and neutrality to unionization constitute "things of value" in violation of § 302. Mulhall's first argument is that the complaint alleges that the things provided to Unite Here under the MOA have "monetary and market value" and, therefore, he has sufficiently pled his claim for purposes of a motion to

dismiss. However, this allegation is conclusory. In considering a motion to dismiss, a court need not consider as true an unsupported, conclusory allegation. *Oxford Asset Mgmt, Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002) (stating "conclusory allegations, unwarranted deductions of facts[,] or legal conclusions masquerading as facts will not prevent dismissal."); *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009) (holding that pleadings that "are no more than conclusions, are not entitled to the assumption of truth[;] they must be supported by factual allegations").

Mulhall also argues that while the Eleventh Circuit has not defined the term "thing of value" under § 302, it has determined that generally the term is a term of art and thus the term should be interpreted the same way in all circumstances and under all statutes. However, Mulhall has not offered any authority to support this sweeping proposition and the authorities he does rely on are inapplicable to this matter. *See U.S. v. Nilsen*, 967 F.2d 539, 542-43 (11th Cir. 1992) (holding that the use of the term "thing of value" is a term of art as used in various *criminal* statutes).

Turning to the specific concessions provided by Mardi Gras, Mulhall argues that, under Eleventh Circuit law, each of the three things provided to Unite Here under the MOA – access to non-public portions of the facility, lists of employees, and neutrality as to unionization – individually constitute a "thing of value." In asserting that providing Unite Here with a

list of current employees and their addresses constitutes a "thing of value," Mulhall cites to *U.S. v. Jordan*, 582 F.3d 1239, 1247 (11th Cir. 2009), as support for this proposition. However, the information obtained in *Jordan* was the criminal records of absentee voters, which was obtained from a government database without proper authorization. *Id.* Thus, Mulhall's claim that the employee information Unite Here seeks from Mardi Gras is "indistinguishable" from the information at issue in *Jordan* rings hollow at best. Mulhall further argues that confidential business information has long been recognized as property. While this may be true, Mulhall fails to cite a single case from any circuit that establishes that a list of employees and their addresses constitutes confidential business information. Consequently, Mulhall's arguments that the case law clearly recognizes such a list as a thing of value fails.

Next, Mulhall argues that Mardi Gras's permitting Unite Here to have access to nonpublic parts of the facility amounts to a thing of value. In support of this argument, Mulhall cites to *U.S. v. Schiffman*, 552 F.2d 1124, 1126 (5th Cir. 1977), which found that a union official who asked for and received a highly reduced hotel room rate could have received a thing of value in violation of § 302, and *N.L.R.B. v. BASF Wyandotte Corp.*, 798 F.2d 849, 856 (5th Cir. 1986), which found that allowing the union chairman to use a company office, telephone and copier may constitute a thing of value under § 302. However, neither of these cases are dispositive of the issue. First, both involved

things that had objective monetary value. The hotel room in *Schiffman* and the office space and use of a phone and copier in *BASF* both had ascertainable market values. Furthermore, in both cases, the thing of value was given to a specific, individual union official for his exclusive use. That is not the case here. The MOA simply grants Unite Here access to the employee break room. Thus, it does not give a specific union official exclusive use of something with a clear market value. Consequently, Mulhall has not cited to any binding authority that holds that giving Unite Here access to the employee break room constitutes a thing of value under § 302.

Last, Mulhall argues that Mardi Gras's agreement to remain neutral regarding the union also constitutes a thing of value under § 302. Again, the only Eleventh Circuit case cited by Mulhall does not support his proposition. The Eleventh Circuit case on which Mulhall relies involved a criminal statute and found that a defendant's attempt to silence a government witness could be a thing of value under the criminal statute. *Nilsen*, 967 F.2d at 542-43. Clearly, that is not the same thing as Mardi Gras *agreeing* to remain neutral regarding the union. Consequently, Mulhall has failed to cite to a single binding case that demonstrates that the concessions Mardi Gras gave Unite Here amount to things of value under § 302. Thus, Mulhall has failed to provide binding, on point authority to support his argument that the concessions Unite Here received from Mardi Gras violate § 302.

Given the decisions in *Adcock* and *Sage* and Mulhall's failure to cite any applicable binding authority or any on point decisions from other Circuit Courts, it is

ORDERED that Defendant Unite Here Local 355's Motion to Dismiss [DE-40] is GRANTED.

1. Plaintiff's complaint is DISMISSED with prejudice.

2. All pending motions not otherwise ruled upon are DENIED as moot.

3. This case is CLOSED.

DONE AND ORDERED in Miami, Florida, this 24th day of January, 2011.

/s/ Patricia A. Seitz
PATRICIA A. SEITZ
UNITED STATES
DISTRICT JUDGE

cc: All counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 08-61766-CIV-SEITZ/O'SULLIVAN

MARTIN MULHALL,

Plaintiff,

v.

UNITE HERE LOCAL 355, HOLLYWOOD GREYHOUND TRACK, INC.,

Defendants. /

ORDER GRANTING MOTION TO DISMISS

(Filed Apr. 22, 2009)

THIS action arises from Defendants Hollywood Greyhound Track ("Hollywood") and Unite Here Local 355's ("Unite Here") organizing concessions agreement ("MOA") to which Plaintiff ("Mulhall") is not a party. Mulhall protests that he is under imminent threat of injury because, according to the MOA, Hollywood will provide Unite Here with "thing[s] of value," namely his employee information, access to non-public areas such as employee break rooms during non-work hours, and employer neutrality to unionization, which violates section 302 of the Labor Management Relations Act ("LMRA"). At the April 13, 2009 hearing on Unite Here's Motion to Dismiss or Stay [DE 7, 9], Unite Here maintained that agreements like the MOA have never been deemed to trade a thing of value under the LMRA, but nonetheless

stipulated that, should the MOA be held enforceable against Hollywood in a related case,[1] it would not seek Mulhall's employee information. Mulhall responded that he was nevertheless subject to an imminent threat of injury because he may be unionized by Unite Here with the support of Hollywood's allegedly illegal concessions. Because Mulhall has not shown that his legally protected interests have been invaded and that his purported injury is actual or imminent rather than speculative and hypothetical, he lacks standing to contest the MOA's illegality, and therefore the Court will grant Unite Here's motion to dismiss.

I. Background[2]

Hollywood maintains a dog track at which Mulhall has worked first as a paramutual clerk and then as a groundskeeper for forty years. In an effort to establish a gaming facility, Hollywood executed the MOA in 2004 with Unite Here, the local hospitality services union. The MOA exchanged Unite Here's support for Hollywood's gaming license campaign and labor peace for three labor organizing concessions: (1) Hollywood must provide union representatives access

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[1] Unite Here sued to compel Hollywood to arbitration in *Unite Here Local 355 v. Hollywood Greyhound Track, Inc.*, No. 61655-CIV-SEITZ.

[2] The Court takes the relevant background from the parties' statements at the hearing in addition to the facts in the pleadings.

to "non-public" work premises to organize employees during non-work hours; (2) Hollywood must provide the union a list of employees, their job classifications, departments, and addresses; and (3) Hollywood must remain neutral to the unionization of employees. (*See* DE 1 at 14-18 MOA ¶¶ 4, 7, 8, 11.) With these concessions, Unite Here may be more successful in its efforts to organize Hollywood's employees. If a majority of employees elect Unite Here pursuant to the MOA's "card check" election procedure, Hollywood must recognize Unite Here as the employees' exclusive bargaining representative. (*See* MOA ¶ 9.) At this time, Unite Here has not been elected as the employees' exclusive bargaining representative.

In 2006, Hollywood began operating its gaming facility, and, pursuant to the MOA, provided Unite Here employee information lists in 2006 and 2007. In 2008, Hollywood refused to provide Unite Here any employee information and, after they ignored requests to arbitrate the issue, Unite Here brought suit to compel arbitration. (*See* DE 1 "Complaint" ¶ 13.) On November 4, 2008, Mulhall sued both Hollywood and Unite Here, arguing that Unite Here's attempt to enforce the MOA violates section 302 of the LMRA. (*See* Complaint ¶ 14.) Mulhall seeks: (1) to enjoin Hollywood's performance under the MOA; and (2) a declaration that the MOA's concessions and Unite Here's attempt to enforce the MOA violates section 302. (*See* Complaint at 11.) On November 21, 2008, Unite Here moved to dismiss or stay his action. (*See* DE 7, 9.) In an effort to resolve the matter at the

April 13 hearing, Unite Here stipulated that it would not seek Mulhall's employee information. Mulhall insisted that his case concerned more than his own information, but the question remained whether he had standing to assert a section 302 claim regarding the MOA's other concessions.

II. Standards

Section 302 of the LMRA permits private litigants, such as Mulhall, to bring suits "to obtain injunctions in order to protect the integrity of employees' collective bargaining representatives in carrying out their responsibilities." *Sinclair Refining Co. v. Atkinson,* 370 U.S. 195, 204-05 n. 19 (1962), *overruled on other grounds,* 398 U.S. 235 (1970). To that end, section 302 proscribes the "pay[ing], lend[ing], or deliver[ing] . . . [of] any money or other thing of value" between unions and employers. 29 U.S.C. § 186(a), (b). Significantly, section 302 also charges the Attorney General to enforce its prohibitions. 29 U.S.C. § 186(d); *Sinclair Refining,* 370 U.S. at 205 n. 19.

While section 302 provides a cause of action to private litigants, Article III of the Constitution requires Mulhall to submit an actual case or controversy. *Region 8 Forest Service Timber Purchasers Council v. Alcock,* 993 F.2d 800, 804 (11th Cir. 1993) (citing *Allen v. Wright,* 468 U.S. 737, 750 (1984)) Thus, to avail himself of section 302's private right of action,

Mulhall must satisfy three basic tenets of constitutional standing. First, he must have suffered or be under imminent threat of suffering a concrete and particularized injury in fact. *Region 8 Forest Service Timber Purchasers Council,* 993 F.2d at 804-05 (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992)). Imminence requires that the injury is likely to occur immediately:

> Although "imminence" is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes-that the injury is *certainly* impending. It has been stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiffs own control. In such circumstances we have insisted that the injury proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all.

Lujan, 504 U.S. at 564 (citations omitted) (emphasis in original).

Second, Mulhall's injury must be traceable to Hollywood's performance of the organizing concessions to Unite Here. *Region 8 Forest Service Timber Purchasers Council,* 993 F.2d at 804-05 (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992)).

Finally, it must be likely, as opposed to merely speculative, that his injury will be redressed by a favorable decision from this Court. *Id.* In addition, as a prudential limit on his standing, Mulhall must advance his own rights and interests rather than rely on the rights and interests of others. *Region 8 Forest Service Timber Purchasers Council,* 993 F.2d at 804-05 (citing *Valley Forge College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 469 (1982)).

III. Discussion

Although Unite Here stipulated that it will not seek Mulhall's employee information, Mulhall asserts that he is subject to an imminent risk of injury because Unite Here seeks: (1) information on other employees; (2) access to his workplace during non-work hours; and (3) Hollywood's neutrality in an effort to become his exclusive bargaining representative.[3] Further, Mulhall contends that, should Unite

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[3] Mulhall claims that these concessions are "thing[s] of value" under section 302 because *United States v. Nilsen,* 967 F.2d 539, 542-43 (11th Cir. 1992) and *United States v. Moore,* 525 F.3d 1033, 1048 (11th Cir. 2008), which concerned mail extortion and public corruption statutes, both read intangible items such as refraining from testifying and sexual services to be things of value. Mulhall also maintains that *Hotel Employees and Restaurant Employees Union v. Sage Hospitality Resources, LLC,* 390 F.3d 206 (3d Cir. 2004) and *Adcock v. Freightliner LLC,* 550 F.3d 369 (4th Cir. 2008), which hold that organizing concessions do not violate section 302, are erroneous and contrary to the law of this circuit as articulated in *Nilsen* and *Moore.*

Here be elected as his exclusive bargaining agent with the support of Hollywood's concessions, it would be in breach of its fiduciary obligations because it would be indebted to Hollywood. Mulhall's alleged injuries, however, are not supported by legally cognizable interests and are too speculative to be considered by this Court.

The particular concessions at issue, Mulhall's colleagues' information, access to Hollywood's premises, and Hollywood's neutrality, do not by themselves demonstrate an injury in fact because Mulhall does not have an enforceable interest in these concessions. *See Cox Cable Communications, Inc. v. United States,* 992 F.2d 1178, 1182 (11th Cir. 1993) ("No legally cognizable injury arises unless an interest is protected by statute or otherwise"). First, Mulhall cannot rely on Hollywood's use of other employees' information to establish his own injury. *See Region 8 Forest Service Timber Purchasers Council,* 993 F.2d at 804-05 (citation omitted). Second, Mulhall does not show that he has a cognizable property interest in Hollywood's premises. *Cf Lechmere, Inc. v. N.L.R.B.,* 502 U.S. 527, 529-31, 540-41 (1992) (employer "barged] [ ] nonemployee organizers from its property"). Third, Mulhall does not demonstrate a legally protected interest in Hollywood's speech. Hollywood's First Amendment free speech rights are not implicated here because there is no state action prohibiting Hollywood from speaking. Indeed, Hollywood privately and voluntarily contracted away its right to speak on Unite Here's unionization efforts, and Mulhall

cannot now stake claim to the rights Hollywood relinquished.

Furthermore, because Unite Here has not been elected as Mulhall's exclusive representative, and indeed may not ever be elected,[4] Unite Here's purported conflict of interest is at best speculative, and if Hollywood's employees do not elect Unite Here, its fiduciary obligations to Mulhall will never exist. By contrast, the union in *Adcock* had fiduciary obligations, which the plaintiff employees could raise in their section 302 challenge to the concessions agreement in that case, because the union had been elected by a majority of employees and recognized as their exclusive bargaining agent. *Adcock,* 550 at 372-73.[5] In this case, however, Mulhall cannot assert a similar injury because Unite Here has not been elected as his exclusive bargaining representative. Indeed, since Unite Here may lose a future card check election, any ruling on Mulhall's section 302 claim would be advisory and not connected to an imminent, actual injury.

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[4] To be sure, because the question of the MOA's enforceability is yet to be decided by an arbitrator in Unite Here's companion case, Unite Here may never have the opportunity to request a card check election. *See Unite Here v. Hollywood Greyhound Track, Inc.,* No. 08-61655-CIV-SEITZ.

[5] While the Court intimates no view on the merits of Mulhall's case because he lacks standing, he fails to show how the holdings in *Nilsen* and *Moore* are controlling and why the *Adcock* and *Sage* holdings are unpersuasive.

Mulhall argues that section 302 provides standing because it extends its prohibitions to unions, like Unite Here, who "seek[ ] to represent" him. 29 U.S.C. 186(a)(2). However, assuming *arguendo* that Unite Here and Hollywood traded a thing of value in violation of section 302, it does not follow that Mulhall was injured merely because Unite Here sought to represent him. Without demonstrating that Unite Here and Hollywood "invaded some legally protected interest of his," Mulhall raises only a generalized grievance and cannot remedy their alleged section 302 violations as a private litigant. *Bochese v. Town of Ponce Inlet,* 405 F.3d 964, 980 (11th Cir. 2005) (citation omitted). To be sure, if Unite Here and Hollywood transgressed section 302 without particularized injury to any private litigant, criminal prosecution would be the appropriate manner of redress. *See, e.g., United States v. Phillips,* 19 F.3d 1565, 1575-76, 84 (11th Cir. 1994) (affirming section 302 conviction for undue pension benefits). Because the Court concludes that Mulhall fails to establish an injury in fact, it need not consider whether Mulhall demonstrates the remaining elements of standing. *See Bochese,* 405 F.3d at 980.

IV. Conclusion

For the reasons discussed above, because Mulhall: (1) failed to establish his legal interest in the MOA's concessions, and (2) has referred to injuries which would require the Court to speculate whether Unite Here will be elected and recognized, he lacks

standing to assert a section 302 claim. Thus, the Court will grant Unite Here's motion to dismiss. Accordingly, it is hereby

ORDERED that

(1) Unite Here's Motion to Dismiss [DE 7] is GRANTED. Mulhall's Complaint [DE 1] is DISMISSED.

(2) Unite Here's Motion to Stay [DE 9] is DENIED AS MOOT.

DONE AND ORDERED in Miami, Florida, this 22nd day of April, 2009.

/s/ Patricia A. Seitz
PATRICIA A. SEITZ
UNITED STATES
DISTRICT JUDGE

cc: Magistrate Judge John O'Sullivan
Counsel of Record

618 F.3d 1279

Martin MULHALL, Plaintiff-Appellant,

v.

UNITE HERE LOCAL 355, Hollywood Greyhound Track, Inc., d.b.a. Mardi Gras Gaming, Defendants-Appellees.

No. 09-12683

United States Court of Appeals,
Eleventh Circuit

Sept. 10, 2010

William L. Messenger, Nat. Right to Work Legal Defense Foundation, Springfield, VA, for Plaintiff-Appellant.

Noah Scott Warman, Sugarman & Susskind, P.A., Miami, FL, Robert L. Norton, Allen, Norton & Blue, P.A., Miami, FL, Brianne Marie Strohsahl, Michael Anthony Pancier, Rothstein Rosenfeldt Adler, Ft. Lauderdale, FL, Peter L. Sampo, Allen, Norton & Blue, P.A., Coral Gables, FL, for Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before BARKETT and MARCUS, Circuit Judges, and HOOD,* District Judge.

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* Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

MARCUS, Circuit Judge:

Martin Mulhall ("Mulhall"), an employee at the Hollywood Greyhound Track, Inc., d/b/a Mardi Gras Gaming ("Mardi Gras"), appeals from the district court's dismissal of his complaint against Mardi Gras and UNITE HERE Local 355 ("Unite"), a labor union, for violations of § 302 of the Labor Management Relations Act ("LMRA"). Mulhall sued Unite and Mardi Gras to enjoin enforcement of a Memorandum of Agreement ("MOA"), whereby Unite agreed to spend money in support of Mardi Gras' public campaign to obtain a gaming license, in exchange for Mardi Gras' assistance in making Unite the exclusive bargaining agent for Mardi Gras' currently non-unionized workforce. Appellant Mulhall, who vigorously opposes being unionized, claims that the organizing assistance promised by Mardi Gras violates § 302 of the LMRA, which makes it illegal for an employer to deliver, or for a union to receive, any "thing of value," subject to limited exceptions. 29 U.S.C. § 186(a)-(b). The district court dismissed Mulhall's complaint for lack of standing, holding that he lacked a cognizable injury. After thorough review, we conclude, however, that Mulhall has standing to prosecute this claim in federal court, and therefore that the case is justiciable. Accordingly, we reverse and remand for further proceedings.

I.

Mulhall's grievance stems from a Memorandum of Agreement concluded between Mardi Gras and Unite on August 23, 2004. The substance of the agreement was as follows. The local union, Unite, promised to lend financial support to a ballot initiative regarding casino gaming that would benefit Mardi Gras, and, if recognized as the exclusive bargaining agent for Mardi Gras' employees, to refrain from picketing, boycotting, striking, or undertaking "other economic activity" against Mardi Gras.[1] In exchange, Mardi Gras promised to help Unite organize the company's non-unionized workforce. This assistance notably included providing complete lists of Mardi Gras' employees, including their job classifications, departments, and home addresses;[2] the use of Mardi Gras' property, including non-public areas, for organizing;[3] a "neutrality agreement" (which Mulhall

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[1] "During the life of this Agreement, the Union will not engage in a strike, picketing[,] or other economic activity at any gaming facility covered by this Agreement. . " MOA ¶ 11. *See also* Complaint, ¶ 11 (describing promises of monetary and other support for ballot proposition concerning gaming).

[2] "Within ten (10) days following receipt of written notice of intent to organize Employees, the Employer will furnish the Union with a complete list of Employees, including both full and regular part-time Employees, showing their job classifications, departments[,] and addresses. Thereafter, the Employer will provide updated complete lists monthly, or at a longer period of time if the Union does not request the lists monthly." MOA ¶ 8.

[3] "If the Union provides written notice to the Employer of its intent to organize Employees covered by this Agreement, the

(Continued on following page)

calls a "gag clause") that prohibits any speech or actions by Mardi Gras or its agents that state or imply opposition to the union;[4] a waiver of Mardi Gras' right to seek NLRB-supervised *secret* elections to verify the union's majority status, and an agreement to abide by a less formal "card-check" procedure instead;[5] and a promise not to file unfair labor practice

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Employer shall provide access to its premises and to such Employees by the Union. The Union may engage in organizing efforts in non-public areas of the gaming facility during Employees' non-working times (before work, after work, and during meals and breaks) and/or during such other periods as the parties may mutually agree upon." MOA ¶ 7.

[4] "The Employer will take a neutral approach to unionization of Employees. The Employer will not do any action nor make any statement that will directly or indirectly state or imply any opposition by the Employer to the selection by such Employees of a collective bargaining agent, or preference for or opposition to any particular union as a bargaining agent." MOA ¶ 4.

[5] "The Union may request recognition as the exclusive collective bargaining agent for Employees. The Arbitrator selected through the procedures set out [herein], or another person mutually agreed to by Employer and Union, will conduct a review of Employees' authorization cards and membership information submitted by the Union in support of its claim to represent a majority of such Employees. If that review establishes that a majority of such Employees has designated the Union as their exclusive collective bargaining representative or joined the Union, the Employer will recognize the union as such representative of such Employees. The Employer will not file a petition with the National Labor Relations Board for any election in connection with any demand for recognition provided for in this agreement." MOA ¶ 9.

charges against Unite for violations of employee rights during the union's organizing campaign.[6]

Pursuant to the MOA, Unite spent over $100,000 campaigning for the gaming-related ballot initiative favored by Mardi Gras. Thereafter, in May and July 2008, Unite sent Mardi Gras written notices of its intent to organize Mardi Gras' employees, and demanded that Mardi Gras provide the organizing assistance promised in the MOA. Mardi Gras, however, refused to provide the assistance, claiming, with the advice of new legal counsel, that the MOA was illegal and unenforceable.

Unite responded in late September 2008 by filing a petition to compel arbitration, pursuant to the MOA's arbitration clause, in the United States District Court for the Southern District of Florida. *See Unite HERE Local 355 v. Hollywood Greyhound Track, Inc.*, Case No. 08-61655-PAS (S.D.Fla.2008).[7] Unite requested enforcement of the MOA, but also made clear that if the MOA were found unlawful, it would "request restitutionary damages from the arbitrator or court based on quantum meruit for the time and money the Union and its members spent on

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[6] "The Union and the Employer will not file any charges with the National Labor Relations Board in connection with any act or omission occurring within the context of this agreement; arbitration . . . shall be the exclusive remedy." MOA ¶ 9.

[7] Unite named Mardi Gras as the sole respondent, and Mulhall has never been a party to Unite's separate lawsuit against Mardi Gras.

the political campaign to obtain a gaming license for Mardi Gras (estimated at over $100,000) and over $100,000 in business which Mardi Gras would have lost from a boycott." Joint Scheduling Rpt., February 23, 2009, at *2. Mardi Gras filed an answer and counterclaimed for a declaration that the MOA was invalid.

On April 15, 2009, the district court entered an order compelling arbitration of the parties' dispute, including Mardi Gras' claim that the MOA was unenforceable. The matter was arbitrated, and on August 6, 2009, an arbitrator returned a ruling in favor of Unite, finding the MOA enforceable and requiring Mardi Gras to provide the requested organizing assistance. Mardi Gras then moved the district court to vacate the award, and Unite moved to confirm it. *See Hollywood Greyhound Race Track, Inc. v. Unite HERE Local 355*, Case No. 09-61760-WJZ (S.D.Fla.2009). The district court denied Mardi Gras' motion and confirmed the award in most material respects. The court granted Mardi Gras' motion to vacate the award only insofar as the arbitrator had unilaterally extended the terms of the MOA by one year, apparently as an equitable remedy for Mardi Gras' breach in failing to provide the contractually promised organizing assistance. *See Hollywood Greyhound Race Track, Inc. v. Unite HERE Local 355*, Case No. 09-61760-Zloch (S.D.Fla.2009) (Order granting in part and denying in part motions to vacate and to confirm arbitration award, at 6).

All the while, Mulhall was pursuing his own effort to block enforcement of what he characterized as an illegal and collusive arrangement between a union and an employer. Not long after Mardi Gras filed its counterclaim for declaratory relief, Mulhall filed his own action (the instant case) seeking an injunction pursuant to § 302(e) of the LMRA, 29 U.S.C. § 186(e), claiming that the MOA violated § 302(a)-(b) of the statute. On April 22, 2009, one week after ordering Mardi Gras and Unite to arbitrate the validity of the MOA, the district court dismissed Mulhall's complaint for lack of standing, holding that he had failed to show an injury-in-fact that was "actual or imminent," since it was possible that he would never be unionized even if Unite received all of the specified organizing assistance from the Hollywood Greyhound Track.

Mulhall timely filed this appeal, claiming to have both Article III and prudential standing to seek to enjoin the MOA pursuant to § 302. Unite disagrees, and also says that Mulhall's claim is not ripe for review because Mardi Gras has refused to provide organizing assistance, and may never do so.

II.

A.

We consider first whether Mulhall has Article III standing. As the party invoking federal jurisdiction, Mulhall bears the burden of demonstrating his standing to sue. *Pittman v. Cole,* 267 F.3d 1269, 1282 (11th

Cir.2001). To do so, he must show that: (1) he has suffered, or imminently will suffer, an injury-in-fact; (2) the injury is fairly traceable to the defendants' conduct; and (3) a favorable judgment is likely to redress the injury. *Harrell v. The Florida Bar,* 608 F.3d 1241, 1253 (11th Cir.2010). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (quoting *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 889, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990)).[8] Whether Mulhall has standing to seek an injunction of the MOA pursuant to § 302 is a legal issue subject to *de novo* review. *Region 8 Forest Serv. Timber Purchasers Council v. Alcock,* 993 F.2d 800, 806 (11th Cir.1993).

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[8] Although a court may consider materials beyond the pleadings if the defendant has mounted a factual attack on subject-matter jurisdiction, there is no suggestion in this record that the defendant has done so, and we consider this to be a facial attack. A plaintiff defending against a facial attack on jurisdiction enjoys "safeguards similar to those retained when a Rule 12(b)(6) motion to dismiss for failure to state a claim is raised," and both the district court and a reviewing court "*must* consider the [well-pleaded] allegations in the plaintiff's complaint as true." *McElmurray v. Consol. Gov't of Augusta-Richmond County,* 501 F.3d 1244, 1251 (11th Cir.2007) (emphasis added) (citations omitted).

To demonstrate an injury-in-fact, Mulhall is required to show that he has a legally cognizable interest that has been or is imminently at risk of being invaded. *Lujan,* 504 U.S. at 560, 112 S.Ct. 2130. This requirement merely ensures that Mulhall, like any plaintiff, "has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues.'" *Flast v. Cohen,* 392 U.S. 83, 99, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968) (quoting *Baker v. Carr,* 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)). Importantly, therefore, the relevant question is not whether Mulhall has a legal right to be free from involuntary unionization, or is legally entitled to enjoin the MOA. "[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal," *Warth v. Seldin,* 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); it "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated," *Flast,* 392 U.S. at 99, 88 S.Ct. 1942. At issue today is only whether Mulhall has a stake in this controversy that is real enough and concrete enough to entitle him to be heard in a federal district court concerning his § 302 claim, nothing more.

Mulhall has a cognizable associational interest under the First Amendment to challenge the alleged collusive arrangement between the employer and the union under § 302. If Unite is certified as the majority representative of Mardi Gras' employees, Mulhall will have been thrust unwillingly into an agency

relationship, where the union is his "exclusive representative[ ] . . . for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment" under § 9(a) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 159(a). This arrangement creates a fiduciary relationship, akin to that between a trustee and beneficiary. *See Chauffeurs, Teamsters, and Helpers, Local 391 v. Terry,* 494 U.S. 558, 567, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990). Moreover, regardless of whether Mulhall can avoid contributing financial support to or becoming a member of the union, *cf.* Fla. Const. art. I, § 6 ("The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization."), its status as his exclusive representative plainly affects his associational rights. His views, for example, like those of any employee, may be at variance with

> a wide variety of activities undertaken by the union in its role as exclusive representative. His moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. One individual might disagree with a union policy of negotiating limits on the right to strike, believing that to be the road to serfdom for the working class, while another might have economic or political objections to unionism itself. An employee might object to the union's wage policy because it violates guidelines designed to limit inflation,

> or might object to the union's seeking a clause in the collective-bargaining agreement proscribing racial discrimination. The examples could be multiplied.

Abood v. Detroit Bd. of Ed., 431 U.S. 209, 222, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977). Thus, it has long been recognized that such "association for the purpose of advancing economic, as well as political or religious, interests falls within the protection of the First Amendment." *Scott v. Moore*, 680 F.2d 979, 990 (5th Cir.1982) (en banc), *rev'd on other grounds sub nom. United Bhd. of Carpenters & Joiners of Am., Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 103 S.Ct. 3352, 77 L.Ed.2d 1049 (1983) (citing *Bhd. of R.R. Trainmen v. Virginia*, 377 U.S. 1, 8, 84 S.Ct. 1113, 12 L.Ed.2d 89 (1964), *Thomas v. Collins*, 323 U.S. 516, 531, 65 S.Ct. 315, 89 L.Ed. 430 (1945), and *Abood*, 431 U.S. at 222, 97 S.Ct. 1782).

Just as "[t]he First Amendment clearly guarantees the right to join a union," *Hobbs v. Hawkins*, 968 F.2d 471, 482 (5th Cir.1992) (citing *Thomas*, 323 U.S. at 532, 65 S.Ct. 315), it "presupposes a freedom not to associate" with a union, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984) (citing *Abood*, 431 U.S. at 234-235, 97 S.Ct. 1782). This freedom of course may be outweighed by other important governmental interests, such as the promotion of productive labor-management relations. In this instance, for example, although the federally-created right of a majority-favored union to supersede an employee's direct bargaining relationship with his

employer amounts to "compulsory association," *Acevedo-Delgado v. Rivera*, 292 F.3d 37, 42 (1st Cir.2002), that compulsion "has been sanctioned as a permissible burden on employees' free association rights," *id.*, based on a legislative judgment that collective bargaining is crucial to labor peace, *Abood*, 431 U.S. at 224, 97 S.Ct. 1782.

The relevant point here, however, is that employees like Mulhall *have* such an associational interest. *See Scott*, 680 F.2d at 990 (holding that First Amendment interests of nonunion employees to work in nonunion environment were invaded by pro-union conspiracy); *see also Rivera*, 292 F.3d at 42. In other words, while "compulsory affiliation with . . . [a] union does not, without more, violate the First Amendment rights" of employees, *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 517, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991) (addressing both private- and public-employer contexts), it is no less true that "compelling an employee . . . to belong to . . . a union . . . *implicates* that person's First Amendment right not to associate," *Romero v. Colegio De Abogados De P.R.*, 204 F.3d 291, 301 (1st Cir.2000) (emphasis added).[9] We conclude that Mulhall has a legally

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[9] Indeed, even if Mulhall's associational interest were characterized as being primarily commercial in nature, his interest would still be entitled to protection under the First Amendment, albeit to a lesser extent. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 634, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984) (O'Connor, J., concurring).

cognizable associational interest. We do not purport to assess the strength of Mulhall's interest; we say only that it is enough to allow him to get his ticket stamped for admission to the federal court in order to be able to argue that the arrangement between Mardi Gras and Unite is illegal under § 302.

Mulhall has also adequately alleged that this associational interest is at imminent risk of invasion, because Mardi Gras' provision of considerable and varied organizing assistance pursuant to the MOA will substantially increase the likelihood that Mulhall will be unionized against his will. Under controlling law, a plaintiff faces an "imminent" harm when there is "a realistic danger of sustaining a direct injury as a result" of the challenged action. *Fla. State Conf. of NAACP v. Browning,* 522 F.3d 1153, 1161 (11th Cir.2008) (quoting *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979)). "How likely is enough is necessarily a qualitative judgment," *id.,* but, under our law, "probabilistic harm is enough injury in fact to confer standing in the undemanding Article III sense," *id.* at 1163 (citation and alteration omitted).

Mulhall has adequately alleged that the organizing assistance promised by Mardi Gras in the MOA is valuable, and indeed essential, to Unite's effort to gain recognition. As an initial matter, the complaint says that the provision of lists showing the classifications, departments, and home addresses of Mardi Gras' employees "permits Local 355 to target employees during organizing campaigns and send union

organizers to employees' homes," Complaint ¶ 17(b); that access to Mardi Gras' facilities, including "non-public areas of the gaming facility" during non-working hours, "is objectively useful to Local 355 for organizing nonunion employees," *id.* ¶ 20(b); that the neutrality agreement is also useful to Local 355 because, among other things, it silences potentially persuasive opponents of unionization within the company, including all managers and supervisors who otherwise might discuss the disadvantages of unionization, *id.* ¶ 25(b); and that Mardi Gras' waiver of its right to demand a secret, NLRB-conducted election, Complaint, ¶ 10(a)-a method which has "acknowledged superiority in ascertaining whether a union has majority support," *Linden Lumber Division, Summer & Co. v. NLRB,* 419 U.S. 301, 304, 95 S.Ct. 429, 42 L.Ed.2d 465 (1974)-similarly figured into the *quid pro quo* exchange with Unite, *id.* ¶ 11.

The complaint in this case, moreover, highlights Unite's own belief that the employer's organizing assistance is essential to its effort to gain majority status. The complaint contains the following quotation from Unite's own allegations in parallel litigation:

> [T]he Employer's failure to abide by the Agreement's provisions has caused and will cause serious irreparable injuries to the Union and its members. Without a list the Union is unable to provide information to many of the Employer's workers, and hence unable to obtain recognition as the employees'

> representative as contemplated by Section 9 of the Agreement, and unable to find out from workers whether the Employer is complying with other provisions of the Agreement. . . . The resulting delay in recognition means a delay in obtaining the financial benefits of union representation for employees, and increased organizing expenses and lost revenues for the Union, but the amount of such damages is extraordinarily burdensome to calculate, and also there are non-financial advantages to recognition which cannot be put into monetary terms. The Union is also suffering irreparable injuries in loss of standing with employees and loss of bargaining power.

Complaint ¶ 27 (quoting *Unite HERE Local 355 v. Hollywood Greyhound Track, Inc.*, Case No. 08-61655-PAS (S.D.Fla.) (Complaint ¶ 11)). Also noteworthy, of course, is the consideration Unite offered for the organizing assistance: it promised not to "picket, boycott, strike, or take other economic action against Mardi Gras," and that it would "expend monetary and other resources" to support a ballot proposition favored by Mardi Gras. *Id.* ¶ 11. Unite ultimately spent $100,000 on the initiative campaign, suggesting that the organizing assistance it bargained for was significant in a monetary sense.

Taken together, the allegations in Mulhall's complaint yield a strong inference that the organizing assistance is a critical ingredient for Unite's success, and that, if provided, it will substantially increase the

likelihood that Mulhall will be unionized against his will. That "probabilistic harm" is a cognizable injury for purposes of standing. *Browning*, 522 F.3d at 1163.[10]

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[10] On appeal, Mulhall cites a number of academic authorities in support of his contention that the organizing assistance and other concessions by Mardi Gras in the MOA substantially increase the likelihood that Unite will achieve majority recognition. *See, e.g.*, Laura J. Cooper, *Privatizing Labor Law: Neutrality/Card Check Agreements and the Role of the Arbitrator*, 83 Ind. L.J. 1589, 1591-93 (2008) (noting that "all indications" in empirical research are that "neutrality/card check agreements [are] . . a remarkably successful mechanism" in achieving recognition; explaining that neutrality agreements ban many lawful employer tactics thought to contribute to union representation election losses, including captive audience speeches, "aggressive and hierarchical" employer communications, and "intense personal campaigning by supervisors" (citation omitted); and observing that it is unclear "why a non-union employer might be willing to contract with a stranger union to forego lawful campaign tactics and a government-conducted secret-ballot election, both of which would enhance its chances of remaining union-free," except as a result of "rational business judgment"); Charles I. Cohen, Joseph E. Santucci, Jr. & Jonathan C. Fritts, *Resisting its Own Obsolescence-How the National Labor Relations Board is Questioning the Existing Law of Neutrality Agreements*, 20 Notre Dame J.L. Ethics & Pub. Pol'y 521, 523 (2006) (noting that neutrality agreements, employee lists, and access to employer facilities "significantly increase the chances that an organizing drive will be successful"); Adrienne E. Eaton & Jill Kriesky, *Union Organizing under Neutrality and Card Check Agreements*, 55 Indus. & Lab. Rel. Rev. 42, 57 (2001) (finding strong evidence that "[c]ard check agreements . . substantially increased the rate of union recognition" as compared with NLRB-conducted secret elections, and that "[r]equirements that employers provide unions with employee lists and time limits to campaigns were both associated with

(Continued on following page)

For obvious reasons, Mulhall's claim also satisfies the causation element of the standing inquiry. Mulhall's claimed injury flows from Mardi Gras' imminent provision of organizing assistance under the MOA, in response to Unite's demands. This injury is "fairly traceable" to the defendants' conduct. *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130 (alteration omitted).

Finally, Mulhall's allegations satisfy the redressability requirement. "Redressability is established . . . when a favorable decision 'would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered.'" *Harrell*, 608 F.3d at 1260 n. 7 (citation omitted). If Mulhall obtains a judgment enjoining enforcement of the MOA, the substantial increase in the risk of unionization attributable to the MOA will have been eliminated.

B.

Unite Local 355 also appears to suggest that Mulhall's claim is barred by the prudential standing doctrine, which comprises three non-constitutional, non-jurisdictional, policy-based limitations on the availability of judicial review. *Am. Iron and Steel Inst.*

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greater union success"). This material, however, is neither part of the pleadings, nor subject to judicial notice, nor included in any affidavits or attachments to the pleadings, so we do not consider it in resolving this facial attack on subject-matter jurisdiction.

v. OSHA, 182 F.3d 1261, 1274 n. 10 (11th Cir.1999). The doctrine requires (1) that the plaintiff's complaint fall within the "zone of interests" protected by the statute or constitutional provision at issue; (2) that the complaint not require the court to pass on abstract questions or generalized grievances better addressed by the legislative branches; and (3) that the plaintiff assert his or her own legal rights and interests rather than the legal rights and interests of third parties. *Harris v. Evans*, 20 F.3d 1118, 1121 (11th Cir.1994) (en banc). Mulhall easily satisfies the second and third requirements. The only real dispute here is whether Mulhall meets the "zone-of-interests" test, which limits judicial review to claims of injury that are sufficiently related to the core concerns of a given statute.

The zone-of-interests test "does not require the plaintiff to show an identifiable 'legal interest' that may entitle him to relief." *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater*, 2 F.3d 1514, 1526 (11th Cir.1993) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp* ("*ADAPSO*"), 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970)). Rather, the plaintiff need only show "that the relationship between [his] alleged interest and the purposes implicit in the substantive provision [is] more than 'marginal[ ],'" *City of Clearwater*, 2 F.3d at 1526 (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987)). *See also ADAPSO*, 397 U.S. at 153, 90 S.Ct. 827.

The relationship between Mulhall's alleged interest and the purposes of § 302 is more than "marginal." Section 302 is "a conflict-of-interest statute," *United States v. Browne,* 505 F.3d 1229, 1248 (11th Cir.2007); it bans the exchange of anything of value between a union and an employer, subject to a strictly limited set of exceptions, *see* 29 U.S.C. § 186(a)-(c). Its purpose is to "protect employees in dealings between the union and employer," *Jackson Purchase Rural Elec. Coop. Ass'n v. Local Union 816, Int'l Bhd. of Elec. Workers,* 646 F.2d 264, 267 (6th Cir.1981), and specifically to protect them "from the collusion of union officials and management," *Mosley v. Nat'l Maritime Union Pension and Welfare Plan,* 438 F.Supp. 413, 421 (E.D.N.Y.1977). Indeed, the legislative history of § 302 demonstrates that the provision was intended to "prohibit[ ], among other things, the buying and selling of labor peace," *see* S.Rep. No. 98-225 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3477, something that the MOA at issue here at least arguably does, *see* Complaint ¶ 11; MOA ¶ 11. Mulhall's complaint thus falls within the zone of interests that § 302 was designed to protect.

In sum, Mulhall has adequately pleaded facts supporting Article III standing, and his claim raises no prudential standing concerns.

III.

Unite next argues that Mulhall's claim is not ripe, because his alleged injury is contingent on the

outcome of Mardi Gras' own lawsuit against Unite to void the MOA. Specifically, Unite suggests that Mardi Gras' lawsuit, if successful, would shield Mulhall from the agreement's allegedly illegal effects, and from the concomitant increase in the likelihood of unionization. We remain unpersuaded.

The ripeness doctrine is one of the several "strands of justiciability doctrine . . . that go to the heart of the Article III case or controversy requirement." *Harrell,* 608 F.3d at 1246 (quotation marks and citation omitted). While standing concerns the identity of the plaintiff and asks whether he may appropriately bring suit, ripeness concerns the timing of the suit. *Id.* at 1261. The function of the ripeness doctrine is to "protect[ ] federal courts from engaging in speculation or wasting their resources through the review of potential or abstract disputes." *Id.* at 1257-58 (citation and quotation marks omitted). "To determine whether a claim is ripe, we assess both the fitness of the issues for judicial decision and the hardship to the parties of withholding judicial review." *Id.* at 1258 (emphasis omitted). "The fitness prong is typically concerned with questions of 'finality, definiteness, and the extent to which resolution of the challenge depends upon facts that may not yet be sufficiently developed.'" *Id.* (citation and quotation marks omitted). "The hardship prong asks about the costs to the complaining party of delaying review until conditions for deciding the controversy are ideal." *Id.*

Unite's argument, which goes to the "fitness" prong of the ripeness inquiry, has some appeal, for it is generally true that the existence of contingencies raises fitness concerns that "militat[e] in favor of postpon[ing]" review. *Id.* at 1263 (quoting *AT&T Corp. v. FCC,* 349 F.3d 692, 700 (D.C.Cir.2003)). Specifically, if a plaintiff's claimed injury depends on the resolution of other judicial proceedings, there may well be fitness concerns that render the plaintiff's claim presumptively unripe. *See, e.g., In re Lowenschuss,* 170 F.3d 923, 932 (9th Cir.1999) (holding that claim in bankruptcy dependent on judgment in parallel proceedings in New Jersey was unripe, where Third Circuit had not yet ruled on an appeal); *Lincoln House, Inc. v. Dupre,* 903 F.2d 845 (1st Cir.1990).[11]

Yet, to determine whether a future contingency creates fitness (and ultimately ripeness) concerns, a court must assess the *likelihood* that a contingent event will deprive the plaintiff of an injury. *See*

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[11] The "fitness" issue raised by the existence of future contingencies, which goes to ripeness, is related to but distinct from the "imminence" requirement of a cognizable injury-in-fact, which goes to standing. The question, for purposes of standing, is how likely the challenged conduct is to cause the plaintiff an injury. The question for ripeness purposes is whether the defendant's *engagement* in the challenged conduct is contingent on future events whose non-occurrence might deprive the plaintiff of an injury-in-fact. *See Bova v. City of Medford,* 564 F.3d 1093, 1096 (9th Cir.2009) (noting that ripeness and standing are interrelated, insofar as non-occurring future events will deprive the plaintiff of an injury-in-fact).

Pittman, 267 F.3d at 1278. In other words, it is not merely the existence, but the "*degree* of contingency [that] is an important barometer of ripeness." *Riva v. Massachusetts*, 61 F.3d 1003, 1011 (1st Cir.1995) (emphasis added). *See also United Steelworkers of Am., Local 2116 v. Cyclops Corp.*, 860 F.2d 189, 194 (6th Cir.1988) ("In undertaking a ripeness analysis, we. . . . pay particular attention to the likelihood that the harm alleged by plaintiffs will ever come to pass.").

In this case, it is extremely unlikely that Mardi Gras' parallel litigation, in its present posture, will deprive Mulhall of an injury. As recounted above, the district court granted Unite's motion to compel arbitration of the dispute over the validity of the MOA, and the arbitrator rendered a judgment in favor of Unite. Mardi Gras moved to vacate the award, but the district court confirmed the award in all respects but one. Thus, despite its long-standing unwillingness to comply with the disputed provisions of the MOA, Mardi Gras is *now* under compulsion of the law to do just that.

We can divine only one theoretical scenario in which Mulhall could be deprived of an injury at this point, namely, if Mardi Gras appealed the district court's order confirming the arbitration award, obtained a stay of the district court's judgment pending appeal, *and* prevailed on appeal. But that scenario is a decidedly remote possibility under the circumstances, because Mardi Gras is very unlikely to succeed in an appeal of the judgment confirming the arbitration

award. The Federal Arbitration Act authorizes a federal court to vacate an arbitral award in only four instances:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a); *Frazier v. CitiFinancial Corp., LLC,* 604 F.3d 1313, 1321, 1324 (11th Cir.2010) (holding that statutory grounds for vacatur are exclusive). Aside from its claim that the arbitrator exceeded his authority by extending the term of the MOA for one year – a claim upon which the district court granted relief – Mardi Gras never argued that the arbitral award was subject to vacatur on any of the enumerated statutory grounds.

Furthermore, although Mardi Gras might argue on appeal that the validity of the MOA should not

have been arbitrated in the first instance, Mardi Gras is very unlikely to prevail on that claim, either. As the district court observed in granting Unite's motion to compel arbitration, federal law required arbitration of the subject dispute, pursuant to the MOA's arbitration clause, "unless it [could] be said with positive assurance that the arbitration clause [was] not susceptible of an interpretation that cover[ed] the asserted dispute," with any doubts about arbitrability resolved "in favor of coverage." *AT & T Techs. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) (citations omitted). The clause at issue here broadly covered "any disputes over the interpretation or application of" the MOA, a phrase that seems at least arguably expansive enough to cover a dispute over whether certain parts of the agreement were legal and could be applied at all.

It is also exceedingly unlikely that Mardi Gras could successfully obtain a stay of the district court's judgment confirming the arbitral award pending appeal. To be sure, a stay is theoretically (and procedurally) possible: "[a]rbitration awards are not self-enforcing, [but] . . . must be given force and effect by being converted to judicial orders" on an appropriate motion to confirm or vacate, *D.H. Blair & Co. v. Gottdiener,* 462 F.3d 95, 104 (2d Cir.2006) (internal quotation marks omitted), and a district court may enter a stay of any judgment pending an appeal, *see* Fed.R.Civ.P. 62, including a judgment upon an order confirming or vacating an arbitral award. Yet, in

ruling on a requested stay, the district court first would have to assess the appellant's likelihood of success on appeal. *See Venus Lines Agency v. CVG Industria Venezolana De Aluminio, C.A.*, 210 F.3d 1309, 1313-14 (11th Cir.2000).[12] As we see it, the likelihood that Mardi Gras will succeed in any appeal is minimal due to the constraints of the arbitration system, and the additional likelihood of a stay is correspondingly low.

In short, the contingency, if any, occasioned by Mardi Gras' parallel litigation to void the MOA is very remote. Thus, Mulhall's claim raises no substantial fitness concerns. And, "'[w]here . . . there are no significant agency or judicial interests militating in favor of delay, [lack of] "hardship" cannot tip the balance against judicial review.'" *Harrell,* 608 F.3d at 1259 (quoting *Consol. Rail Corp. v. United States,* 896 F.2d 574, 577 (D.C.Cir.1990)). Accordingly, Mulhall's claim is ripe for review, too.

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[12] The likelihood of success is one factor a district court must consider when ruling on a requested stay. The other factors are: whether, absent a stay, the movant will suffer irreparable damage; whether the adverse party will suffer no substantial harm from issuance of a stay; and whether the public interest will be served by issuing a stay. *Venus Lines Agency v. CVG Industria Venezolana De Aluminio, C.A.*, 210 F.3d 1309, 1313-14 (11th Cir.2000).

IV.

Beyond the issues of standing and ripeness, the parties have extensively briefed the merits question of whether § 302 provides a claimant like Mulhall with a private right of action, as well as the question of whether the organizing assistance specified in the MOA actually violates § 302 of the LMRA. Neither question, however, is properly before us on review of the district court's order dismissing this action for lack of subject-matter jurisdiction.

The existence of a private right of action is an issue "separate and distinct" from the issue of standing, *The Wilderness Society v. Kane County, Utah,* 581 F.3d 1198, 1215 (10th Cir.2009), and "is not jurisdictional," *Northwest Airlines, Inc. v. County of Kent, Mich.,* 510 U.S. 355, 365, 114 S.Ct. 855, 127 L.Ed.2d 183 (1994). *See also Air Courier Conference of Am. v. Am. Postal Workers Union, AFL-CIO,* 498 U.S. 517, 523, n. 3, 111 S.Ct. 913, 112 L.Ed.2d 1125 (1991). Although the district court mentioned in passing that § 302 provides a private right of action, *Mulhall v. Unite HERE Local 355, et al.,* No. 08-61766-PAS (S.D. Fla. April 22, 2009) (Order granting motion to dismiss, at 3), and although the Supreme Court has observed in dicta that § 302(e) "expressly permit[s] suits for injunctions . . . to be brought in the federal courts by private litigants," *Sinclair Ref. Co. v. Atkinson,* 370 U.S. 195, 205 n. 19, 82 S.Ct. 1328, 8 L.Ed.2d 440 (1962), the issue is simply not for us to decide in this appeal.

Similarly, the question of whether the disputed organizing assistance is a "thing of value," whose provision by Mardi Gras or acceptance by Unite would violate § 302, is beyond the scope of this appeal. "[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." *Warth*, 422 U.S. at 500, 95 S.Ct. 2197. The merits will be for the district court to decide on remand.

V.

In sum, we conclude that Mulhall has constitutional and prudential standing to maintain his claim for injunctive relief under § 302 of the Labor Relations Management Act, and that his claim is ripe for review. Accordingly, we reverse the district court's order and judgment of dismissal and remand the case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 11-10594-FF

MARTIN MULHALL,

Plaintiff-Appellant,

versus

UNITE HERE LOCAL 355,
HOLLYWOOD GREYHOUND TRACK, INC.,
doing business as Mardi Gras Gaming,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Filed Apr. 25, 2012)

BEFORE: WILSON and FAY, Circuit Judges, and RESTANI,* Judge.

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* Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Charles R. Wilson
UNITED STATES
CIRCUIT JUDGE

ORD-42

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. **08-CV-61766-Zloch-Snow**

MARTIN MULHALL

Plaintiff,

v.

UNITE HERE LOCAL 355,
HOLLYWOOD GREYHOUND
TRACK, INC., d/b/a
MARDI GRAS GAMING

Defendants

COMPLAINT

(Filed Nov. 3, 2008)

Preliminary Statement

This is a suit for injunctive and declaratory relief under § 302 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186. Section 302(a)(2) makes it unlawful for an employer to deliver "any money or other thing of value . . . to any labor organization," except for that permitted by § 302(c). Section 302(b)(1) makes it unlawful for a union to demand or receive anything prohibited by § 302(a).

UNITE HERE Local 355 ("Local 355") is demanding that Hollywood Greyhound Track, d/b/a Mardi Gras Gaming ("Mardi Gras") deliver several "thing[s] of value" to the union not permitted by § 302(c): (1) information about nonunion employees; (2) access

and use of the employer's property for organizing; and (3) control over the employer's communications with nonunion employees. In so doing, Local 355 is violating the plain language of § 302(b)(1) of the LMRA.

Plaintiff Martin Mulhall is an employee of Mardi Gras who does not want Local 355 to obtain information about himself and his co-workers, to have access to his workplace, or to become his exclusive representative. In this suit, Plaintiff seeks an injunction under § 302(e) that prohibits Local 355 from demanding or receiving from his employer "things of value" in the form of organizing assistance and a declaration that Local 355's demands violate § 302(b)(1) of the LMRA.

Jurisdiction and Venue

1. This action arises under § 302 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186. This Court has subject matter jurisdiction over this action pursuant to § 302(e), 29 U.S.C. § 186(e), and under 28 U.S.C. § 1331.

2. This is also a case of actual controversy in which Plaintiff seeks a declaration of his rights under 28 U.S.C. §§ 2201 and 2202.

3. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b), 1391(c), and 1392(a). The events giving rise to this suit occurred in this judicial district, the Defendants transact business in this judicial district, and Plaintiff resides in this judicial district.

The Parties

4. UNITE HERE Local 355 ("Local 355") is a labor organization headquartered in Miami, Florida that transacts business and represents employees in this judicial district. Local 355 is under the trusteeship and control of UNITE HERE, a labor organization, which is responsible for all of Local 355's actions stated herein.

5. Hollywood Greyhound Track Inc., d/b/a Mardi Gras Gaming ("Mardi Gras") is a Florida corporation engaged in an industry affecting interstate commerce and is an employer that does business in this judicial district. Mardi Gras owns and operates the Mardi Gras Gaming facility in Hollywood, Florida, which sells gaming and entertainment services and hosts groups and group events.

6. Plaintiff Martin Mulhall resides in Davie, Florida and is employed by Mardi Gras at its Mardi Gras Gaming facility.

The Memorandum of Agreement

7. Local 355 does not exclusively represent Plaintiff or other employees employed by Mardi Gras at the Mardi Gras Gaming facility, but seeks to represent these employees and would admit them to membership.

8. On 23 August 2004, Local 355 and Mardi Gras entered into a Memorandum of Agreement ("MOA") attached hereto as Exhibit A.

9. The MOA requires that Mardi Gras assist Local 355 with organizing its nonunion employees by delivering several valuable things to Local 355, including information about Mardi Gras' nonunion employees, access and use of Mardi Gras' properties and facilities for organizing, and control over Mardi Gras' communications with its nonunion employees.

10. The MOA further requires that the representational procedures of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*, not be invoked or utilized. Specifically, the MOA mandates that Mardi Gras:

a. not petition the National Labor Relations Board under § 9 of the NLRA, 29 U.S.C. § 159, for secret-ballot elections in which employees can vote on whether they want union representation, *see* MOA ¶ 9;

b. not file unfair labor practice charges with the National Labor Relations Board under § 8 of the NLRA, 29 U.S.C. § 158, regarding violations of employee rights during the union's organizing campaign, *see* MOA ¶ 9.

11. In exchange, *quid pro quo,* for Mardi Gras' agreement to deliver valuable organizing assistance to the union, Local 355 promised Mardi Gras labor peace, namely that Local 355 would not picket, boycott, strike, or take other economic action against Mardi Gras, and agreed to expend monetary and other resources to support a ballot proposition favored by Mardi Gras.

Local 355 Demands Three Things of Value From Mardi Gras

12. In May 2008, and again in July 2008, Local 355 demanded that Mardi Gras enforce the MOA at the Mardi Gras Gaming facility by providing written notices of its intent to organize the employees employed at the facility.

13. On 26 September 2008, Local 355 filed a Petition and Complaint to Compel Arbitration ("Petition") with the District Court for the Southern District of Florida to compel Mardi Gras to enforce the MOA at the Mardi Gras Gaming facility. *See UNITE HERE Local 355 v. Hollywood Greyhound Track, Inc.*, Case No. 08-61655CIV-Seitz/O'Sullivan (S.D. Fla. 2008).

14. By demanding that Mardi Gras enforce the MOA as stated above in ¶¶ 12-13, Local 355 has demanded that Mardi Gras deliver to it three things of value: information about nonunion employees under ¶ 8 of the MOA; access and use of the Mardi Gras Gaming facility under ¶ 7 of the MOA; and control over Mardi Gras' communications with its nonunion employees under ¶ 4 of the MOA.

15. *Information.* Local 355 demands that Mardi Gras provide it with information about nonunion employees pursuant to ¶ 8 of the MOA, which states:

> Within ten (10) days following receipt of written notice of intent to organize Employees, the Employer will furnish the Union with a complete list of Employees, including both full and regular part-time Employees, showing

> their job classifications, departments, and addresses. Thereafter, the Employer will provide updated complete lists monthly, or at a longer period of time if the Union does not request the lists monthly.

(hereinafter "Information").

16. The Information demanded by Local 355 is the property of Mardi Gras and is maintained by Mardi Gras as confidential business information.

17. The Information that Local 355 demands is a thing of value because, among other things:

a. Local 355 subjectively desires the Information and believes it to be valuable;

b. the Information is objectively useful to Local 355 because, among other things, it permits Local 355 to target employees during organizing campaigns and send union organizers to employees' homes; and

c. the Information has monetary and market value.

18. *Access.* Local 355 demands that Mardi Gras grant it access and use of the Mardi Gras Gaming facility pursuant to ¶ 7 of the MOA, which states:

> If the Union provides written notice to the Employer of their intent to organize Employees covered by this Agreement, the Employer shall provide access to its premises and to such Employees by the Union. The Union may engage in organizing efforts in non-public areas of the gaming facility during

> Employees' non-working times (before work, after work, and during meals and breaks) and/or during such other periods as the parties may mutually agree upon.

(hereinafter "Access").

19. The Mardi Gras Gaming facility is the private property of Mardi Gras.

20. The Access demanded by Local 355 is a thing of value because, among other things:

a. Local 355 subjectively desires the Access and believes it to be valuable;

b. it is objectively useful to Local 355 for organizing nonunion employees; and

c. the right to access and use the Mardi Gras Gaming facility has monetary and market value.

21. *Gag-Clause.* Local 355 demands that Mardi Gras provide it with control over Mardi Gras' communications with its nonunion employees pursuant to ¶ 4 of the MOA, which states:

> The Employer will take a neutral approach to unionization of Employees. The Employer will not do any action nor make any statement that will directly or indirectly state or imply any opposition by the Employer to the selection by such Employees of a collective bargaining agent, or preference for or opposition to any particular union as a bargaining agent. Upon request of the Union, the Employer shall issue a written statement to the

> employees acknowledging this agreement and its terms.

(hereinafter "Gag Clause").

22. Enforcement of ¶ 4 of the MOA will provide Local 355 with contractual control over Mardi Gras' communications and contractual control over the actions of Mardi Gras' managers, supervisors, and agents.

23. Mardi Gras has proprietary interests in its communications, relations with employees, and the actions of its managers, supervisors, and agents.

24. Mardi Gras would take actions and make statements that state or imply opposition to Local 355 but for ¶ 4 of the MOA.

25. The Gag Clause demanded by Local 355 is a thing of value because, among other things:

a. Local 355 subjectively desires the Gag Clause and believes it to be valuable;

b. the Gag Clause is objectively useful to Local 355 because, among things, it silences a persuasive party that would otherwise oppose Local 355 and, *inter alia,* prevents employees from learning about the disadvantages of Local 355; and

c. control over Mardi Gras' communications has monetary and market value.

26. Delivery of the Information, Access, and Gag Clause to Local 355 will result in a significant

monetary benefit to the union because, among other things, it will reduce the expense of conducting an organizing campaign against Mardi Gras employees and likely result in an increase in dues revenues for the union.

27. Local 355 had plead that it believes the Information, Access, and Gag Clause to be valuable in ¶ 11 of its Petition in *UNITE HERE Local 355 v. Hollywood Greyhound Track, Inc.*, Case No. 08-61655, which states:

> [T]he Employer failure to abide by the Agreement's provisions has caused and will cause serious irreparable injuries to the Union and its members. Without a list the Union is unable to provide information to many of the Employer's workers, and hence unable to obtain recognition as the employees' representative as contemplated by Section 9 of the Agreement, and unable to find out from workers whether the Employer is complying with other provisions of the Agreement. The deprivation of speech rights caused by the Employer's violation of Section 8 is inherently-irreparable injury. The resulting delay in recognition means a delay in obtaining the financial benefits of union representation for employees, and increased organizing expenses and lost revenues for the Union, but the amount of such damages is extraordinary [sic] burdensome to calculate, and also there are non-financial advantages to recognition which cannot be put into in [sic] monetary terms. The Union is also suffering

irreparable injuries in loss of standing with employees and loss of bargaining power.

Paragraph 11 of the Petition is quoted solely as a statement of Local 355's subjective beliefs regarding the organizing assistance, not for its objective truth.

28. Unions have made, and are liable to make, wage, benefit, and other concessions at the expense of employees they exclusively represent in collective bargaining in exchange, *quid pro quo,* for things of value from employers that include lists of information about nonunion employees, the right to access and use nonunion properties and facilities, control over employer communications with nonunion employees, and other forms of valuable organizing assistance.

29. Mardi Gras has refused to deliver the Information, Access, and Control that the Local 355 demands from it.

Local 355's Demands for Organizing Assistance Create An Imminent Risk of Injury to Plaintiff

30. Local 355's demands for Information, Access, and a Gag Clause creates an actual and imminent risk of the following irreparable harms to Plaintiff's rights and interests:

a. Mardi Gras will deliver personnel information about Plaintiff and his co-workers to Local 355, including home addresses, job descriptions, and work shifts;

b. Local 355 will have access to Plaintiff and his co-workers in their workplace;

c. Plaintiff and his co-workers will be deprived of information from Mardi Gras about Local 355 and union representation;

d. Plaintiff will be exclusively represented by Local 355, and thus forced into an unwanted compulsory agency relationship that deprives him of his ability to deal with Mardi Gras with respect to his terms and conditions of employment, and;

e. Local 355 will partially control and change Plaintiffs terms and conditions of employment, including his wages, benefits, and terms of employment.

Local 355's Demands for Information, Access, and Control Violate § 302(b)(1) of the LMRA

31. Section 302(a)(2) of the LMRA states in pertinent part that "[i]t shall be unlawful for any employer . . . to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value . . . to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer." 29 U.S.C. § 186(a)(2).

32. Section 302(b)(1) of the LMRA states that "[i]t shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other

thing of value prohibited by subsection (a) of this section." 29 U.S.C. § 186(b)(1).

33. Section 302(c) of the LMRA, 29 U.S.C. § 186(c), states nine exceptions to the general prohibitions of §§ 302(a) and (b), none of which apply here.

34. Mardi Gras is an "employer" under § 302(a)(2). Local 355 is a "labor organization . . . which represents, seeks to represent, or would admit to membership, any of the employees of" Mardi Gras under § 302(a)(2) of the LMRA and is a "person" under § 302(b)(1) of the LMRA.

35. The Information, Access, and Gag Clause demanded by Local 355 from Mardi Gras are each a "thing of value" under §§ 302(a) and (b), and are not covered by any of the exceptions listed in § 302(c).

36. Mardi Gras would violate § 302(a)(2) if it delivered or agreed to deliver to Local 355 the Information, Access, or Gag Clause demanded by the union.

37. Local 355 has violated § 302(b)(1) by requesting and demanding that Mardi Gras deliver "thing[s] of value" to Local 355 in the form of Information, Access, and a Gag Clause.

38. At this time, it is not alleged that Mardi Gras has violated § 302(a)(2) because it has not delivered the Information, Access, or Gag Clause demanded by Local 355. However, Mardi Gras is a necessary party to this suit.

Prayer for Relief

WHEREFORE, Plaintiff prays that this Court:

A. Issue a permanent injunction that enjoins the Local 355 from:

1. requesting, demanding, or receiving from Mardi Gras things of value in the form of information about Mardi Gras' nonunion employees, access and use of Mardi Gras' nonunion properties and facilities, and control over Mardi Gras' communications with its nonunion employees; and

2. invoking, enforcing, or attempting to enforce ¶¶ 4, 7, and 8 of the MOA.

B. Issue a declaratory judgment that:

1. Local 355's demands for things of value in the form of information about Mardi Gras' nonunion employees, access and use of Mardi Gras' nonunion properties and facilities, and control over Mardi Gras' communications with its nonunion employees, are unlawful under § 302(b)(1) of the LMRA; and

2. paragraphs 4, 7, and 8 of the MOA are unlawful, void, and facially invalid under § 302 of the LMRA.

C. Order any other legal or equitable relief deemed just and proper.

Respectfully submitted this 3 day of November 2008.

/s/ [Illegible]
Daniel R. Levine
(Fla. Bar No. 0057861)
Email:
drlevine@sbwlawfirm.com
Shapiro, Blasi, Wasserman,
& Gora, P.A.
Corporate Center at
Boca Raton
7777 Glades Road,
Suite 400
Boca Raton, Florida 33434
(561) 477-7800
(561) 477-7722 (fax)

William L. Messenger
(Va. Bar No. 47179)*
E-mail: wlm@nrtw.org
c/o National Right to Work
Legal Defense Foundation
8001 Braddock Road,
Suite 600
Springfield, Virginia 22160
(703) 321-8510
(703) 321-9319 (fax)

**Pro hac vice motion*
to be filed

EXHIBIT "A"

MEMORANDUM OF AGREEMENT

THIS AGREEMENT is made and entered into by and between Hollywood Greyhound Track, Inc., (hereinafter referred to as the "Employer"), and Local 355 of UNITE-HERE, AFL-CIO ("Union").

1. This Agreement shall cover all employees employed in classifications in the bargaining unit described in Exhibit A, or in classifications called by different names when performing similar duties, (referral to hereinafter as "Employees") at any and every casino, racing and/or other facility in Miami-Dade and/or Broward counties licensed by the State of Florida for any type of gaming, including associated operations such as hotels and restaurants, food stands, bars, conference centers, grandstands, storerooms and warehouse facilities (hereinafter referred as a "gaming facility" or collectively as "gaming facilities"), which during the term of this Agreement is owned by, operated by or substantially under the control of the Employer. The term "Employer" shall be deemed to include any person, firm, partnership, corporation, joint venture or other legal entity substantially under the control of: (a) the Employer covered by this Agreement; (b) one or more principal(s) of the Employer covered by this Agreement; (c) a subsidiary of the Employer covered by this Agreement; or (d) any person, firm, partnership, corporation, joint venture or other legal entity which substantially controls the Employer covered by this Agreement.

2. The parties hereby establish the following procedure for the purpose of ensuring an orderly environment for the exercise by the Employees of their rights under Section 7 of the National Labor Relations Act and to avoid picketing and/or other economic action directed at the Employer in the event the Union decides to conduct an organizing campaign among Employees.

3. The parties mutually recognize that national labor law guarantees employees the right to form or select any labor organization to act as their exclusive representative for the purpose of collective bargaining with their employer, or to refrain from such activity.

4. The Employer will take a neutral approach to unionization of Employees. The Employer will not do any action nor make any statement that will directly or indirectly state or imply any opposition by the Employer to the selection by such Employees of a collective bargaining agent, or preference for or opposition to any particular union as a bargaining agent. Upon request of the Union, the Employer shall issue a written statement to the employees acknowledging this agreement and its terms.

5. The Union and its representatives will not coerce or threaten any Employee in an effort to obtain authorization cards.

6. Whenever the Employer finds it necessary to hire new Employees for vacancies in job classifications covered by this Agreement at any gaming facility, the Employer shall notify the Union and the

Union may refer applicants for such vacancies. The Employer is free to solicit applicants from any other sources as well. The Employer shall state the qualifications applicants are expected to possess. The Union's selection of applicants for referral shall be on a non-discriminatory basis and shall not be based upon or in any way affected by membership in the Union or the Union's bylaws, rules, regulations, constitutional provisions, or any other aspects or obligation of Union membership policies or requirements, or upon personal characteristics of an applicant where discrimination based upon such characteristics is prohibited by law. The Employer agrees that any interest demonstrated by an applicant in joining the Union shall not constitute grounds for discriminatory or disparate treatment nor adversely impact the applicant's ability to be hired by the Employer. The Employer shall be the sole judge of an applicant's suitability, competence and qualifications to perform the work of any job to be filled.

7. If the Union provides written notice to the Employer of its intent to organize Employees covered by this Agreement, the Employer shall provide access to its premises and to such Employees by the Union. The Union may engage in organizing efforts in non-public areas of the gaming facility during Employees' non-working times (before work, after work, and during meals and breaks) and/or during such other periods as the parties may mutually agree upon. Union representatives will be required to sign in and wear identification while on the premises of the Employer.

The Union will not disrupt or interfere with the normal work, business and operations of the Employer or its Employees.

8. Within ten (10) days following receipt of written notice of intent to organize Employees, the Employer will furnish the Union with a complete list of Employees, including both full and regular part-time Employees, showing their job classifications, departments and addresses. Thereafter, the Employer will provide updated complete lists monthly, or at a longer period of time if the Union does not request the lists monthly.

9. The Union may request recognition as the exclusive collective bargaining agent for Employees. The Arbitrator selected through the procedures set out in Paragraph 14, or another person mutually agreed to by Employer and Union, will conduct a review of Employees' authorization cards and membership information submitted by the Union in support of its claim to represent a majority of such Employees. If that review establishes that a majority of such Employees has designated the Union as their exclusive collective bargaining representative or joined the Union, the Employer will recognize the Union as such representative of such Employees. The Employer will not file a petition with the National Labor Relations Board for any election in connection with any demand for recognition provided for in this agreement. The Union and the Employer will not file any charges with the National Labor Relations Board in connection with any act or omission occurring within

the context of this agreement; arbitration under Paragraph 14 shall be the exclusive remedy.

10. If the Union is recognized as the exclusive collective bargaining representative as provided in paragraph 9, negotiations for a collective bargaining agreement shall be commenced immediately. If the parties are unable to reach agreement on a collective bargaining agreement within 150 days after recognition pursuant to Paragraph 9, all unresolved issues except issues related to retirement and profit-sharing plans shall be submitted for resolution to final and binding arbitration pursuant to Paragraph 14. The arbitrator shall be selected in accordance with the procedure set forth in paragraph 14 below, unless the parties mutually agree otherwise in writing.

11. During the life of this Agreement, the Union will not engage in a strike, picketing or other economic activity at any gaming facility covered by this Agreement, provided that if the Employer recognizes any other union as the exclusive collective bargaining representative of Employees at a gaming facility in the unit described in Exhibit A, or any part thereof, this paragraph shall terminate immediately and without notice.

12. In the event that the Employer sells, transfers, or assigns all or any part of its right, title, or interest in a gaming facility or substantially transfers any or all of the assets used in the operation of the gaming facility, or in the event there is a change in the form of ownership of the Employer, the Employer

shall give the Union reasonable advance notice thereof in writing, and the Employer further agrees that as a condition to any such sale, assignment, or transfer, the Employer will obtain from its successor or successors in interest a written assumption of this Agreement and furnish a copy thereof to the Union, in which event the assignor shall be relieved of its obligations hereunder to the extent that the assignor has fully transferred its right, title, or interest.

13. The Employer shall incorporate the entirety of paragraphs 4, 6, 7, 8, 9, and 10 of this of Agreement in any contract, subcontract, lease, sublease, operating agreement, franchise agreement or any other agreement or instrument giving a right to any person to operate any enterprise at a gaming facility employing employees in classifications listed in Exhibit A, or in classifications called by different names when performing similar duties, and shall obligate any person taking such interest, and any and all successors and assigns of such person, to in turn incorporate said paragraphs in any further agreement or instrument giving a right as described above. The Employer shall enforce such provisions, or at its option, assign its rights to do so to the Union. The Employer shall give the Union written notice of the execution of such agreement or instrument and identify the other party(ies) to the transaction within 15 days after the agreement or instrument is signed. The terms "Employer" and "gaming facility" shall be modified in such agreement or instrument to conform to the terminology in such agreement or instrument but retain

the same meaning as in this Agreement, and the terms "Employer" and "Employees" as used herein shall be modified to refer, respectively, to the person or persons receiving a right to operate an enterprise at a gaming facility and the employees of such person or persons.

14. The parties agree that any disputes over the interpretation or application of this Agreement shall be submitted to expedited and binding arbitration. The parties shall attempt to agree on a mutually acceptable person to serve as arbitrator. If the parties are unable to agree on such a person, or that person is unavailable to serve within fourteen (14) calendar days of notification, then the arbitrator shall be identified by alternate striking from a panel supplied by the American Arbitration Association (AAA) of eleven arbitrators who are members of the National Academy of Arbitrators and who appear on lists of arbitrators regularly provided by the Miami Regional Office of the AAA. The parties shall determine who strikes first by coin toss. The arbitrator whose name remains after each party has exercised five strikes shall be the arbitrator for that dispute; selection of an arbitrator for any subsequent dispute will follow the same procedure. If he is not available to serve within fourteen (14) calendar days of notification, the parties shall select another arbitrator by the same method until they are successful. The arbitrator shall have the authority to determine the arbitration procedures to be followed. The arbitrator shall also have the authority to order the non-compliant party to comply

with this Agreement. The parties hereto agree to comply with any order of the arbitrator, which shall be final and binding and supported by a written statement of the reasons for the order, and furthermore consent to the entry of any order of the arbitrator as the order or judgment of the United States District Court for the Southern District of Florida, without entry of findings of fact and conclusions of law.

15. This Agreement shall be in full force and effect for 4 years from the installation of the first slot machine, Video Lottery Terminal or similar gaming device at the gaming facility, or, only with respect to a Unit at any particular gaming facility, if sooner, upon execution of a collective bargaining agreement or issuance of an interest arbitration award which concludes the collective bargaining agreement negotiations for that Unit, either of which explicitly supersedes this document. This Agreement is not in effect if slot machines, Video Lottery Terminals or similar gaming devices are not installed and open to the public at the gaming facility.

For Hollywood Greyhound Track, Inc.		For Local 355 of UNITE-HERE (AFL-CIO)	
By: /s/	Dan Adkins	By: /s/	Andre J. Balash
Its:	V.P.	Its:	Secretary Treasurer Business Mgr
Date:	8/23/04	Date:	August 23, 2004

Exhibit A

All regular full-time and regular part-time bell department, hotel housekeeping, casino, food and beverage, banquet, conference services, janitorial, cleaning, laundry and shipping and receiving employees (including room cleaners, house persons, bell persons, baggage handlers, door persons, change persons, slot attendants, booth cashiers, carousel attendants, cooks, kitchen employees, utility employees, servers, bussers, bartenders, hotel and dining room cashiers, hosts, concierges, non-hotel public space cleaners, restroom attendants, office cleaners, laundry employees and front desk employees), but excluding all secretarial, office clerical, sales and all managers, supervisors, and guards as defined in the National Labor Relations Act.

OPPOSITION BRIEF

Nos. 12-99, 12-312

In The Supreme Court of the United States

UNITE HERE LOCAL 355,

Petitioner,

v.

MARTIN MULHALL, ET AL.,

Respondents.

MARTIN MULHALL,

Petitioner,

v.

UNITE HERE LOCAL 355, ET AL.,

Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

MARK E. LEVITT*
ALLEN, NORTON & BLUE, P.A.
1477 West Fairbanks Avenue
Suite 100
Winter Park, Florida 32789
(407) 571-2152
mlevitt@anblaw.com

Counsel for Hollywood Greyhound Track, Inc. d/b/a Mardi Gras Gaming

Counsel of Record

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

CORPORATE DISCLOSURE STATEMENT

Hollywood Greyhound Track, Inc. d/b/a Mardi Gras Gaming's parent corporation is Hartman & Tyner, Inc.; and Mardi Gras is not owned, in any part, by a publicly-held company.

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REASONS FOR DENYING THE WRITS

Supreme Court Rule 10 states that a Petition for Writ of Certiorari "will be granted only for compelling reasons." In the present case, both Unite Here ("Union") and Martin Mulhall's petitions should be denied because there is no longer a justiciable case or controversy. In accordance with the considerations enunciated in Rule 10, Hollywood Greyhound Track, Inc. d/b/a Mardi Gras Gaming ("Mardi Gras") contends that the petitions should be denied.

This Court should deny both Petitions for Writs of Certiorari as moot.

A basic principle of Article III is that a justiciable case or controversy must remain "extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997) (internal quotation marks omitted). "[T]hroughout the litigation," the party seeking relief "'must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.'" *Spencer v. Kemna*, 523 U.S. 1, 7, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998) (*quoting Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477, 110 S. Ct. 1249, 108 L. Ed. 2d 400 (1990)). Additionally, there must be a live case at the time of appeal, it is not enough that there may have been a live case or controversy when the case was decided by the court whose judgment the Court is reviewing.

Sosna v. Iowa, 419 U.S. 393, 402, 95 S. Ct. 553, 558, 42 L. Ed. 2d 532 (1975); *Golden v. Zwickler*, 394 U.S. 103, 108, 89 S. Ct. 956, 959, 22 L. Ed. 2d 113 (1969).

In *Diffenderfer v. Central Baptist Church of Miami, Florida, Inc.*, 404 U.S. 412, 92 S. Ct. 574, 30 L. Ed. 2d 5657 (1972) (per curiam), this Court stated:

> "The only relief sought in the complaint was a declaratory judgment that the now repealed Fla. Stat. § 192.06(4) is unconstitutional as applied to a church parking lot used for commercial purposes and an injunction against its application to said lot. This relief is, of course, inappropriate now that the statute has been repealed."

Id. at 414-415, 92 S. Ct., at 575-576. Likewise, in *Burke v. Barnes*, this Court treated a challenge to the validity of a statute that had expired in the same way as a statute that had been repealed, finding that any issues brought up on appeal were mooted after the bill "expired by its own terms." 479 U.S. 361, 363-364, 107 S. Ct. 734, 93 L. Ed. 2d 732 (1987).

This Court has similarly treated the expiration of injunctions as moot. In *Local No. 8-6, Oil, Chemical and Atomic Workers International Union, AFL-CIO v. Missouri*, this Court ruled that, because a lower court's injunction had since "expired by its own terms," there was no "actual matters in controversy essential to the decision of the particular case before [the Court]." 361 U.S. 363, 366, 80 S. Ct. 391, 4 L. Ed. 2d 373 (1960) (*quoting United States v. Alaska*

S.S. Co., 253 U.S. 113, 116, 40 S. Ct. 448, 449, 64 L. Ed. 808 (1920)). It was further noted that the duty of the Court was "to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Id.* (*quoting Mills v. Green*, 159 U.S. 651, 653, 16 S. Ct. 132, 40 L. Ed. 293 (1895)).

In the present case, the Memorandum of Agreement ("neutrality agreement"), which is the subject of the Union's Petition for Writ of Certiorari, has expired by its terms and is no longer in effect. According to the Union, the neutrality agreement expired on December 31, 2011. *Unite Here Local 355 v. Hollywood Greyhound Track, Inc. d/b/a Mardi Gras Gaming, et al.*, No. 0:12-cv-61135-WPD (S.D. Fla. filed June 7, 2012). While Mardi Gras asserts that the Agreement expired earlier, on October 24, 2011, it is clear that the neutrality agreement has still expired by its own terms prior to the Petition for Writ of Certiorari, rendering moot any judicial remedy by this Court. It should be noted that Petitioner Unite Here has filed a Complaint to Compel Arbitration in the United States District Court for the Southern District of Florida. *Unite Here Local 355 v. Hollywood Greyhound Track, Inc. d/b/a Mardi Gras Gaming, et al.*, No. 0:12-cv-61135-WPD (S.D. Fla. filed June 7, 2012). The Union asserts Mardi Gras has an obligation to arbitrate an alleged violation of the neutrality agreement under its terms. In resolving this issue,

it may be necessary, in that case, for the District Court to determine, among other issues, exactly when the neutrality agreement expired in 2011. Should the District Court find the neutrality agreement was in place at the time of the underlying arbitration demand at issue in the Union's Complaint to Compel Arbitration, it may order Mardi Gras to conduct an arbitration of alleged violations of the neutrality agreement. Should such an arbitration take place, it is speculatively possible for the arbitrator to find a violation of the agreement and the Union could reasonably ask for an extension of the neutrality agreement's term as a remedy. Mardi Gras believes that an arbitrator has no lawful authority to extend the term of the now-expired neutrality agreement, but it is possible that it may occur anyway. This prospect, however, does not cure the mootness issue. As this Court stated in *Local No. 8-6,* when confronted with the issue of a separate action pending in another court, "We cannot agree that the pendency of that litigation gives life to the present appeal. When that claim is litigated it will be subject to review, but it is not for us now to anticipate its outcome." 361 U.S. at 370.

The expiration of the neutrality agreement at issue here removes any element of a live case or controversy. Upon the neutrality agreement's expiration, any injuries claimed by Petitioners will not be redressed even with a favorable judicial decision. Furthermore, there is no live case or controversy as any alleged unlawful action has ceased. If a Writ of

Certiorari is granted, any declaratory judgment issued would violate the principle arrived at in *Local No. 8-6* by "declar[ing] principles or rules of law which cannot affect the matter in issue in the case before it." 361 U.S. at 366. As a result of the neutrality agreement having expired by its own terms, this Court should treat the Petitioners' challenges in conformity with its analysis for repealed or expired statutes and should dismiss both Petitions for Writs of Certiorari as moot.

REASONS FOR GRANTING THE WRITS

If the case is not moot, then the Court should grant the Petitions for Writs of Certiorari in order to resolve a Circuit Court split.

If the Court finds that this case is not moot, then it should grant Unite Here's Petition and Martin Mulhall's Cross-Petition in order to resolve a conflict among the circuits. Specifically, the Eleventh Circuit's decision below conflicts with the Third Circuit and Fourth Circuit precedent. *See Adcock v. Freightliner LLC,* 550 F.3d 369 (4th Cir. 2008); *Hotel Employees & Restaurant Employees, Local 57 v. Sage Hospitality Resources, LLC*, 390 F.3d 206 (3d Cir. 2004). In *Adcock*, the Fourth Circuit agreed with the Third Circuit's decision in *Sage Hospitality*, finding that the concessions in that neutrality agreement did "not involve bribery or other corrupt practices." 550 F.3d at 375. *See also Sage Hospitality*, 390 F.3d 206. Furthermore, the Fourth Circuit found that the concessions were

not "a means of bribing representatives of the Union," that "the concessions serve the interests of both Freightliner and the Union," and that "the concessions certainly are not inimical to the collective bargaining process." *Adcock*, 550 F.3d at 375.

In contrast, the Eleventh Circuit found that a neutrality agreement between an employer and a union, which sets ground rules for organizing, may violate Labor Management Relations Act § 302, 29 U.S.C. § 186. *Mulhall v. Unite Here Local 355, et al.*, 667 F.3d 1211 (11th Cir. 2012). The Court reasoned that an employer could improperly influence a union through a neutrality agreement because "innocuous ground rules can become illegal payments if used as valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer." (Pet. 8a). It is well established that a split in the circuits on an important question is proper grounds for the Supreme Court to grant Certiorari to resolve the conflict.

CONCLUSION

For the reasons stated, both Petitions for Writs of Certiorari should be denied as moot. However, if the

case is not moot, then Mardi Gras does not oppose the grant of Certiorari to either Petition.

Respectfully submitted,

MARK E. LEVITT*
ALLEN, NORTON & BLUE, P.A.
1477 West Fairbanks Avenue
Suite 100
Winter Park, Florida 32789
(407) 571-2152

Counsel for Hollywood Greyhound Track, Inc. d/b/a Mardi Gras Gaming

**Counsel of Record*

Nonvember 20, 2012

SUPPORT BRIEF

Supreme Court, U.S.
FILED
AUG 22 2012
OFFICE OF THE CLERK

No. 12-99

IN THE

Supreme Court of the United States

UNITE HERE LOCAL 355,
Petitioner,

v.

MARTIN MULHALL,
Cross-Petitioner and Respondent,

and

HOLLYWOOD GREYHOUND TRACK, INC. d/b/a
MARDI GRAS GAMING,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT MARTIN MULHALL'S MEMORANDUM IN SUPPORT OF THE PETITION

WILLIAM L. MESSENGER
Counsel of Record
c/o NATIONAL RIGHT TO
WORK LEGAL DEFENSE
FOUNDATION, INC.
8001 Braddock Road
Suite 600
Springfield, VA 22160
(703) 321-8510
wlm@nrtw.org

Counsel for Martin Mulhall

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

COUNTER-STATEMENT OF QUESTION PRESENTED

Section 302(a)(2) of the Labor Management Relations Act ("LMRA") makes it unlawful for an employer to pay or deliver "any money or other thing of value . . . to any labor organization," with exceptions inapplicable here. 29 U.S.C. § 186(a)(2). Can the following three types of employer assistance with organizing nonunion employees constitute a "thing of value" to a labor organization under § 302:

1. lists of personal information about nonunion employees;

2. use of private property for organizing; and

3. control over an employer's communications regarding unionization?

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IN THE

Supreme Court of the United States

No. 12-99

UNITE HERE LOCAL 355,
Petitioner,

v.

MARTIN MULHALL,
Cross-Petitioner and Respondent,

and

HOLLYWOOD GREYHOUND TRACK, INC. d/b/a
MARDI GRAS GAMING,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT MARTIN MULHALL'S MEMORANDUM IN SUPPORT OF THE PETITION

STATEMENT OF THE CASE

This is an action by an employee, Martin Mulhall, to stop a union from demanding assistance from his employer with unionizing him and his co-workers. The case is before the Court on the union's petition for review of the United States Court of Appeals for the Eleventh Circuit's decision that the district court erroneously granted a motion to dismiss.

Mr. Mulhall's employer, Mardi Gras Gaming, entered into a Memorandum of Agreement with a union, Unite Here Local 355, agreeing to assist Unite with unionizing its employees in exchange for promises of labor peace and Unite's support for a ballot initiative regarding casino gaming. (Compl., ¶¶ 9-11; Pet. 66a); (Agreement; Pet. 78a-86a). Unite demanded that Mardi Gras enforce the Agreement's organizing provisions against its employees and, when the employer refused, twice attempted to compel enforcement through arbitration. (*Id.* at ¶¶ 12-13; Pet. 67a); *see also* (Pet. 38a-39a). Unite continues to demand that Mardi Gras enforce the Agreement, most recently filing suit on 7 June 2012 to again compel arbitration. *See Unite Here Local 355 v. Hollywood Greyhound Track, Inc.*, No. 12-61135 (S.D. Fla. 2012).

Mulhall alleges that Unite is violating § 302(b)(1) of the Labor Management Relations Act, 29 U.S.C. § 186(b)(1), by demanding from his employer three "thing[s] of value . . . to any labor organization," the giving of which is prohibited under § 302(a)(2), 29 U.S.C. § 186(a)(2): (1) confidential information about Mardi Gras' nonunion employees, including their home addresses and job classifications; (2) use of Mardi Gras' private property for organizing; and (3) a gag-clause on any speech or action by Mardi Gras that states or implies opposition to unionization. (Compl., ¶ 37; Pet. 74a).

The complaint explains in detail why these things, both individually and cumulatively, have significant value to Unite, including monetary value. (*Id.*, ¶¶ 17, 20, 25, 26; Pet. 68a-71a). Unite confirmed the validity of these allegations, pleading in a parallel legal proceeding that Mardi Gras' refusal to comply with

the Agreement resulted in "increased organizing expenses and lost revenues for the Union," (*id.*, ¶ 27; Pet. 71a), and that the union and its members spent more than $100,000 campaigning for the ballot initiative in return for the Agreement. (Pet. 38-39a).

The district court dismissed Mulhall's complaint for lack of standing. (Pet. 29a-33a). The Eleventh Circuit reversed in *Mulhall v. Unite Here*, 618 F.3d 1279 (11th Cir. 2010) ("*Mulhall I*") (Pet. 34a-60a). In so ruling, the court of appeals recognized that "Mulhall has adequately alleged that the organizing assistance promised by Mardi Gras in the MOA is valuable, and indeed essential, to Unite's effort to gain recognition," (Pet. 46a), and that "UNITE ultimately spent $100,000 on the initiative campaign . . . suggest[s] that the organizing assistance it bargained for was significant in a monetary sense." (*Id.* at 48a).

On remand, the district court dismissed the complaint on the merits. (*Id.* at 13a-23a). The Eleventh Circuit reversed again in *Mulhall v. Unite Here*, 667 F.3d 1211 (11th Cir. 2011) ("*Mulhall II*") (Pet. 1a-12a). The court also denied Unite's petition for rehearing en banc. (Pet. 61a-62a).

In *Mulhall II*, the panel majority reasoned that "[i]t seems apparent that organizing assistance can be a thing of value." (Pet. 7a). Although § 302 does not necessarily require proof of monetary value, "a jury could find that Mardi Gras's assistance had monetary value" based on the "$100,000 Unite spent on the ballot initiative that was consideration for the organizing assistance." (*Id.* at 8a-9a). However, the court found that "intangible organizing assistance cannot be loaned or delivered because the actions 'lend' and 'deliver' contemplate the transfer of tangible items," but that an intangible can act as a

"payment" if "its performance fulfills an obligation." (*Id.* at 7a-8a). Thus, according to the court, intangible forms of organizing assistance violate § 302 only "if used as valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer." (*Id.* at 8a).[1] Overall, the court found "Mulhall's allegations . . . sufficient to support a § 302 claim." (*Id.*).

The principle that Unite finds most objectionable is the Eleventh Circuit's conclusion that "[i]t is too broad to hold that all neutrality and cooperation agreements are exempt from the prohibitions in § 302." (*Id.*). Unite seeks this Court's review in the hope of establishing such a blanket exemption to the statute.

REASONS FOR GRANTING THE WRIT

Although Unite's arguments on the merits are invalid—indeed, the union ignores § 302's actual language as if it did not exist[2]—this case nevertheless satisfies the criteria for certiorari under Supreme Court Rules 10(a) and (c). The Eleventh Circuit's decision conflicts with decisions of others courts of

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[1] Mulhall disagrees that intangibles cannot be "deliver[ed]" under § 302, and is filing a conditional cross-petition for a writ of certiorari on this issue.

[2] Section 302 prohibits employers from paying or delivering "any money or other thing of value . . . to any labor organization," subject to exceptions stated at § 302(c). 29 U.S.C. §§ 186(a)(2) and (c). Unite clearly violates the statute's plain language, as it does not even attempt to argue that information, use of property, and control over communications are not "thing[s] of value," or that any of the statute's explicit exemptions apply. Moreover, Unite's assertion that "Plaintiff must show that the neutrality agreement somehow corrupts the union's representation of employees" to prove a violation of § 302 (Pet. 9), has no basis in § 302's text.

appeals on an important question of federal law. However, as discussed below, Unite both understates and overstates the circuit split, and misconstrues the importance of the issue presented.

I. CONFLICT AMONGST THE CIRCUITS

A. The Third and Fourth Circuit's Decisions Are Inconsistent with Not Only the Decision Below, But Also with How Most Circuits Interpret "Thing of Value"

While Unite is correct that the Eleventh Circuit's decision conflicts with *Hotel Employees Union v. Sage Hospitality*, 390 F.3d 206, 219 (3d Cir. 2004) and *Adcock v. Freightliner*, 550 F.3d 369 (4th Cir. 2008), it understates the extent of the circuit split. The Third and Fourth Circuit's crabbed construction of "thing of value," which excludes such common things as information, use of property, and communications, also conflicts with holdings of other courts of appeals.

The phrase "thing of value" is a statutory "term of art" used in numerous federal statutes. *See United States v. Nilsen*, 967 F.2d 539, 542 (11th Cir. 1992); *United States v. Girard*, 601 F.2d 69, 71 (2d Cir. 1979).[3] The phrase is consistently interpreted across statutes to be broad in scope and to encompass intangibles. *See, e.g.*, *United States v. Marmolejo*, 89

[3] This includes, in addition to § 302, conflict of interest statutes that govern federal officials, 5 U.S.C. § 7353(a), public officials, 18 U.S.C. § 201(b), recipients of federal funds, 18 U.S.C. § 666, trustees of employee benefit plans, 18 U.S.C. § 1954, and real estate transactions, 12 U.S.C. § 2607, as well as statutes that prohibit conversion of public property, 18 U.S.C. § 641, extortion by mail, 18 U.S.C. § 876(b), and procurement of a "thing of value" by false pretenses, 18 U.S.C. § 912.

F.3d 1185, 1191 (5th Cir. 1996); *United States v. Collins*, 56 F.3d 1416, 1419 (D.C. Cir. 1995); *Nilsen*, 967 F.2d at 543; *United States v. Schwartz*, 785 F.2d 673, 680 (9th Cir. 1986); *United States v. Jeter*, 775 F.2d 670, 680 (6th Cir. 1985); *Girard*, 601 F.2d at 71; *United States v. Zouras*, 497 F.2d 1115, 1121 (7th Cir. 1974). This expansive interpretation extends to § 302, whose "prohibitions . . . are drawn broadly." *Local 144, Nursing Home Pension Fund v. Demisay*, 508 U.S. 581, 585 (1993); *see also United States v. Ryan*, 350 U.S. 299, 305 (1956) (§ 302 a "broad prohibition"); *Arroyo v. United States*, 359 U.S. 419, 420 (1959) (same).

In addition to the decision below, courts have repeatedly held that the types of things at issue here constitute a "thing of value": (1) information, *see United States v. Barger*, 931 F.2d 359, 368 (6th Cir. 1991); *United States v. Sheker*, 618 F.2d 607, 609 (9th Cir. 1980); *Girard*, 601 F.2d at 71; *see also Carpenter v. United States*, 484 U.S. 19, 26 (1987) ("[c]onfidential business information has long been recognized as property."); (2) use of physical property, *see NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849, 856 & n.4 (5th Cir. 1986)[4]; *United States v. Schiffman*, 552 F.2d 1124, 1126 (5th Cir. 1977); *United States v. Zimmermann*, 509 F.3d 920, 926-27 (8th Cir. 2007); *United States v. Freeman*, 208 F.3d 332, 341 (1st Cir. 2000); and (3) control over the communications of adverse parties, *see Nilsen*, 967 F.2d at 542-43; *Zouras*, 497 F.2d at 1121; *cf. United*

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[4] In *BASF*, the Fifth Circuit recognized that use of company property is a "thing of value" under § 302(a), but held that the exemption at § 302(c)(1) applied because the union officials who used the property at issue were company employees. 798 F.2d at 856. This exemption is inapplicable here.

States v. Tropiano, 418 F.2d 1069, 1076 (2d Cir. 1969) (non-competition agreements constitute "property" under 18 U.S.C. § 1951). *Sage* and *Adcock* are inconsistent with all of these cases.

Moreover, the Sixth Circuit recently held that a "thing of value" in § 302 is not limited to monetary value. *See United States v. Douglas*, 634 F.3d 852, 858 (6th Cir. 2011); *see also United States v. Roth*, 333 F.2d 450, 453 (2d Cir. 1964) (under § 302 "[v]alue is usually set by the desire to have the 'thing' and depends upon the individual and the circumstance."). This holding conforms with the general consensus among lower courts that the phrase "thing of value is not limited in meaning to tangible things with an identifiable commercial price tag." *Schwartz*, 785 F.2d at 679; *see also Zouras*, 497 F.2d at 1121; *Nilsen*, 967 F.2d at 543. The Fourth Circuit's erroneous holding in *Adcock* that a "thing of value" must have an ascertainable monetary value, 550 F.3d at 372, conflicts with these decisions, as well as the text of § 302. *See* 29 U.S.C. § 186(a) ("any money *or other* thing of value") (emphasis added).

Overall, *Sage* and *Adcock* are dramatic departures from how federal courts interpret the phrase "thing of value." These two anomalous decisions have created a conflict among the circuits that this Court should resolve.

B. The Decision Below Does Not Conflict with Decisions Holding That Labor Contracts Are Enforceable Under § 301

Unite's contention that *Mulhall II* conflicts with cases holding that organizing agreements are procedurally enforceable under § 301 of the LMRA is erroneous. (Pet. 12-16). Section 301 grants federal

courts jurisdiction to enforce all "contracts between an employer and labor organization." 29 U.S.C. § 185. That labor contracts are generally enforceable under § 301 does not mean that all of their terms are lawful under § 302 or any other statute. Notably, none of the § 301 cases Unite cites address whether the agreement's terms violate § 302.

In fact, § 302 expressly makes it unlawful for employers and unions to "*agree*" to deliver and receive a thing of value. 29 U.S.C. §§ 186(a) & (b) (emphasis added). The statute is intended to invalidate noncompliant terms of labor contracts, such as collective bargaining agreements, that are otherwise enforceable under § 301.[5] Unite's contention that terms of contracts enforceable under § 301 are somehow exempt from § 302's prohibition is baseless.

II. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW

This case presents an important question, but for reasons opposite from those stated by Unite. To preserve the statute's integrity, protect legitimate labor relations, and prevent the undermining of the National Labor Relations Act, 29 U.S.C. § 151 et seq., this Court must uphold the Eleventh Circuit's con-

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[5] *See, e.g., BASF Wyandotte*, 798 F.2d at 854 (it "is inescapably correct . . . that no employer may be required to bargain over or engage in illegal activity even if that activity is necessary to comply with the terms of the bargaining agreement"); *Jackson Purchase Rural Elec. Co-op. Ass'n v. IBEW*, 646 F.2d 264, 267-68 (6th Cir. 1981) (striking down term of labor agreement under § 302); *Costello v. Lipsitz*, 547 F.2d 1267, 1278 (5th Cir. 1977) (same); 92 Cong. Rec. 4893 (Sen. Byrd) (under § 302, "the representatives of the employees, which means the union, shall not receive a tribute of this kind, even though it may be provided for in a collective bargaining contract").

clusion that things valuable to unions for organizing are not exempt from § 302, and must reject the Third and Fourth Circuit's contrary conclusions.

A. Creating a Judicial Exemption to § 302 for Things Valuable to Unions for Organizing Does Violence to the Statute's Plain Language

This Court has warned that "courts may not create their own limitations on legislation." *Brogan v. United States*, 522 U.S. 398, 408 (1988). It has also disavowed the "proposition that criminal statutes do not have to be read as broadly as they are written, but are subject to case-by-case exceptions." *Id.* at 406; *see also Salinas v. United States*, 522 U.S. 52, 58 (1997) (rejecting judicially-created "federal funds" limitation to a prohibition on government officials accepting "anything of value" because "[t]he statute's plain language fails to provide any basis for limiting [18 U.S.C.] § 666(a)(1)(B) to bribes affecting federal funds.").

The Eleventh Circuit heeded this precedent by refusing "to hold that all neutrality and cooperation agreements are exempt from the prohibitions in § 302." (Pet. 8a). By contrast, the Third and Fourth Circuits in *Sage* and *Adcock* carved an unwritten exemption into § 302 for "thing[s] of value" provided to unions in organizing agreements. In so doing, those courts have done violence to § 302's text that this Court should rectify.

First, "[a] literal construction of § 302 does no violence to common sense." *Arroyo*, 359 U.S. at 424. The statute simply makes it unlawful "for an employer to give to a union representative, and for a union representative to receive from an employer, anything

of value." *United States v. Sun-Diamond Growers*, 526 U.S. 398, 408-09 (1999); *see also Ryan*, 350 U.S. at 305. It is beyond peradventure that information about nonunion employees, use of private property for organizing, and a gag-clause on company speech opposing unionization are each a "thing of value . . . to any labor organization" within the plain meaning of that phrase. 29 U.S.C. § 186(a)(2). To decree that they are not—i.e., that these things are somehow nonexistent or utterly worthless to unions—is to deny the obvious.

Second, Congress enacted nine specific exemptions to § 302's prohibitions at § 302(c)(1-9). An organizing exemption is not among them. Consequently, it is clear that Congress intended no such exemption—*expressio unius est exclusio alterius*.

Finally, § 302 expressly applies to union organizing. When first enacted, the statute prohibited only employer delivery of money or things to current union "representatives." In 1959, Congress extended the statute's prohibitions to: (1) "any labor organization" that "*seeks to represent*, or would admit to membership, any of the employees of such employer," 29 U.S.C. § 186(a)(2) (emphasis added); and, (2) "any employee or group or committee of employees . . . for the purpose of causing such employee or group or committee . . . to influence any other employees in the exercise of the *right to organize* and bargain collectively through representatives of their own choosing." 29 U.S.C. § 186(a)(3) (emphasis added); *see* S. Rep. No. 86-187 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2318, 2330. The notion that this statute harbors an unwritten union-organizing exemption is incompatible with congressional directive.

B. Exempting Organizing Assistance from § 302 Will Undermine the Statute's Purpose of Preventing Union Extortion and Protecting Collective Bargaining

Unite attempts to invert reality when it contends that organizing agreements are a favored form of labor-management cooperation because unions provide employers with consideration for the agreements. (Pet. 26-30). The opposite is true. That unions will provide a *quid pro quo* to employers for valuable organizing assistance is only reason for enforcing § 302 as written.

Foremost, Unite's admission that "[t]he employer always receives consideration for a neutrality agreement" from a union, (Pet. 27), proves that organizing assistance has "value" to unions under § 302. Value is commonly established by the provision of consideration. *See United States v. Townsend*, 630 F.3d 1003, 1011-12 (11th Cir. 2011); *Marmolejo*, 89 F.3d at 1193-94. Thus, here a "jury could find that Mardi Gras' assistance had monetary value" to Unite, if that were required under § 302, based on the "$100,000 Unite spent on the ballot initiative that was consideration for the organizing assistance." *Mulhall II*, 667 F.3d at 1216 (Pet. 8a).[6] Unite's contrary position—that organizing assistance cannot be a "thing of value" to

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[6] Unite's bald assertions that Mulhall did not adequately allege that the organizing assistance has value to the union (Pet. 23), and that Unite agreed to expend resources to support the ballot initiative (*id.* at 28), is refuted by the detailed language of the Complaint (*see id.*, ¶¶ 17, 20, 25, 26; Pet. 68a-71a), and by Unite's own admissions (*id.* at ¶ 27; Pet. 71a). *See Mulhall I*, 618 F.3d at 1288-89 (Pet. 46a-48a).

unions *because* they value it enough to provide consideration for it—is counterintuitive.

Second, that unions will guarantee employers "labor peace," such as not striking or boycotting the employer, in exchange for organizing assistance indicates that these things are within § 302's intended ambit. "The legislative history of § 302 demonstrates that the provision was intended to 'prohibit, among other things, the buying and selling of labor peace,' something that the MOA at issue here at least arguably does." *Mulhall* I, 618 F.3d at 1290-91 (Pet. 52a) (quoting S. Rep. No. 98-225 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3477).

Unions often engage in economic actions and comprehensive "corporate campaigns" to coerce employers into organizing agreements.[7] The latter action involves a "'wide and indefinite range of legal and potentially illegal tactics," including "'litigation, political appeals, requests that regulatory agencies investigate and pursue employer violations of state and federal law, and negative publicity campaigns aimed at reducing the employer's goodwill with employees, investors, or the general public.'" *Smithfield Foods*, 585 F. Supp. 2d at 795-97 (quoting *Food Lion, Inc. v.*

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[7] *See* Laura J. Cooper, *Privatizing Labor Law: Neutrality/Check Agreements and the Role of the Arbitrator*, 83 Ind. L.J. 1589, 1592-93 (2008); Daniel Yager & Joseph LoBue, *Corporate Campaigns and Card Checks: Creating the Company Unions of the Twenty-First Century*, 24 Empl. Rel. L.J. 21 (Spring 1999); Herbert R. Northrup & Charles H. Steen, *Union 'Corporate Campaigns' as Blackmail: the RICO Battle at Bayou Steel*, 22 Harv. J.L. & Pub. Pol'y 771, 779-93 (1999) (describing tactics of a corporate campaign); *Pichler v. UNITE*, 228 F.R.D. 230, 234-40 (E.D. Pa. 2005), *aff'd*, 542 F.3d 380 (3d Cir. 2008) (corporate campaign for an organizing agreement); *Smithfield Foods v. UFCW*, 585 F. Supp. 2d 789, 795-97 (E.D. Va. 2008) (same).

UFCW, 103 F.3d 1007, 1014 n.9 (D.C. Cir. 1997)). Congress intended that § 302 curb such union misconduct, as the statute was enacted, in part, "to deal with 'extortion or a case where the union representative is shaking down the employer.'" *Arroyo*, 359 U.S. at 426 n.8 (quoting 93 Cong. Rec. 4746 (Sen. Taft)).

Finally, union self-dealing for organizing assistance is inimical to the collective bargaining process that § 302 protects. This process involves a union bargaining with an employer as its employees' "exclusive representative" after being so selected by a majority of employees. *See* 29 U.S.C. §§ 159(a) & 158(d). The union acts strictly as an agent of *employees* in collective bargaining, in a fiduciary relationship akin to that between attorney and client. *See Air Line Pilots v. O'Neill*, 499 U.S. 65, 74-75 (1991). The subject of this bargaining are the wages, benefits, and other things that the employer provides to its employees. 29 U.S.C. § 158(d).

Collective bargaining does *not* involve a union dealing with an employer for its own self-interests. Such self-dealing creates an inherent conflict of interest, and is strictly prohibited by § 302 to ensure union fidelity to employee interests. As the Eleventh Circuit correctly stated, "[s]ection 302 is a conflict-of-interest statute," whose "purpose is to protect employees in dealings between the union and employer . . . and specifically to protect them from the collusion of union officials and management." *Mulhall*, 618 F.3d at 1290 (citations omitted); *see also Arroyo*, 359 U.S. at 425-26 (discussing purpose of § 302); *United States v. Lanni*, 466 F.2d 1102, 1104-05 (3d Cir. 1972) (same).

Thus, organizing agreements are not a form of labor-management cooperation favored by federal

law, as Unite erroneously asserts. Unions deal strictly for themselves when negotiating these collusive arrangements, and not for employees as in collective bargaining. By requiring employers to provide valuable things to unions, rather than to employees they represent in collective bargaining, many terms of organizing agreements will violate § 302.[8]

Union self-dealing for organizing assistance threatens legitimate collective bargaining, as unions often make wage and benefit concessions at employee expense to satiate their desire for employer assistance. (Compl., ¶ 28; Pet. 72a).[9] *Adcock* is a prime example. There, the UAW agreed to freeze wages and increase

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[8] By contrast, collective bargaining does not violate § 302 because nothing is delivered to the union itself under § 302(a) that is not permitted by § 302(c). Section 302(a) "does not prohibit the employee himself from accepting money or other things of value if it is directly paid to the employee by the employer." 92 Cong. Rec. 4891 (Sen. Byrd). Section 302(c) exempts those few legitimate employee benefits that also result in the delivery of something to their union representative.

[9] *See Patterson v. Heartland Indus. Partners*, 428 F. Supp. 2d 714, 716 (N.D. Ohio 2006) (employer "receive[d] the union's assurance of no strikes and other guarantees related to wages in return for providing the defendant union with worker addresses and by making plant facilities available to the union") (moot on appeal); *Dana Corp. (Int'l Union, UAW)*, 356 NLRB No. 49, at *22-23 (2010) (union agreed to health benefit and other concessions in exchange for organizing assistance); *Plastech Eng'd Prod., Inc. (Int'l Union, UAW)*, 2005 WL 4841723, at *1-2 (NLRB Div. of Advice Memo. 2005) (same); Charles I. Cohen et al., *Resisting its Own Obsolescence-How the National Labor Relations Board Is Questioning the Existing Law of Neutrality Agreements*, 20 Notre Dame J.L. Ethics & Pub. Pol'y 521, 533-35 (2006) (unions pre-negotiate concessions for organizing assistance).

benefits costs at the expense of employees it already represented, and secretly agreed to make wage, benefit, transfer rights, severance, overtime, and other concessions at the expense of employees it sought to represent, to obtain the employer's assistance with unionizing the latter employees. 550 F.3d at 375. A union sacrificing employee interests at the bargaining table to satiate its self-interest in gaining more dues-paying members is an egregious breach of fiduciary duty, *cf. Aguinaga v. UFCW*, 993 F.2d 1463, 1471 (10th Cir. 1993), and is one of the harms that § 302 exists to prevent.

In short, that unions will provide employers with a *quid pro quo* for assistance with organizing their employees, including guarantees of labor peace and bargaining concessions, only highlights why § 302 must be enforced with respect to these "thing[s] of value." 29 U.S.C. § 186(a)(2).

C. Section 302 Must Be Enforced as Written to Prevent Unions From Supplanting the NLRA's Organizing Procedures

It is said that "chutzpah" is exemplified by killing your parents and then begging for the court's mercy on the grounds of being an orphan. Unite's contention that organizing agreements must be exempted from § 302 to protect the NLRA (Pet. 21-26), aptly fits that description. An organizing agreement's very purpose is to supplant the NLRA's representational procedures and nullify its employee protections.

To effectuate employee free choice during union organizing campaigns, the NLRA provides for secret-ballot elections in § 9(c), 29 U.S.C. § 159(c), and guarantees free speech by employers and unions in

§ 8(c), 29 U.S.C. § 158(c), to ensure an "uninhibited, robust, and wide-open debate" about unionization. *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008) (quotation omitted). The NLRA does *not* grant a union a right to employer assistance with organizing employees, such as use of its private property, *Lechmere v. NLRB*, 502 U.S. 527, 532-34 (1992), or information about its nonunion employees absent an election petition, *see Always Care Home Health Service*, 1998 WL 2001253 (NLRB GC 1998).[10] Indeed, "[b]y its plain terms . . . the NLRA confers rights only on employees, not on unions or their nonemployee organizers." *Lechmere*, 502 U.S. at 532.

Union organizing agreements are specifically designed to replace the NLRA's preferred organizing procedures with a private process that favors the union.[11] They generally ban secret-ballot elections conducted by the National Labor Relations Board (Agreement ¶ 9; Pet. 81a),[12] and gag employer speech

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[10] Contrary to Unite's assertion (Pet. 20-21), enforcing § 302 in this case will not make it unlawful for the NLRB to require that employers provide certain information to unions, such as during elections, because § 302(c)(2) exempts from the statute's prohibitions things provided pursuant to Board orders. 29 U.S.C. § 186(c)(2); *see J.P. Stevens & Co. v. NLRB*, 623 F.2d 322, 328 (4th Cir. 1980).

[11] *See* Cooper, 83 Ind. L.J. at 1593-94; Cohen, 20 Notre Dame J.L. Ethics & Pub. Pol'y at 522; *see also* Jonathan P. Hiatt & Lee W. Jackson, *Union Survival Strategies for the Twenty-First Century*, 12 Lab. Law. 165, 176 (AFL-CIO General Counsel urging unions to "use strategic campaigns to secure recognition . . . outside the traditional representation processes").

[12] As Unite twice admits, Mulhall does not challenge the legality of employer recognition without an election under NLRA § 9(a), 29 U.S.C. § 159(a). (Pet. 22-23). Unite's contention that enforcing § 302 against three types of employer assistance somehow conflicts with this statutory option is baseless, as employers

about unionization to deprive employees of their "right to receive information opposing unionization." *Brown*, 554 U.S. at 68.[13] Here, the Agreement even prohibits Mardi Gras from filing charges with the Board to remedy violations of employee rights under the NLRA. (Agreement ¶ 9; Pet. 81a). The Act's employee protections are replaced with employer assistance to the union. (*Id.* at ¶¶ 4,7,8; Pet. 79a-81a). The NLRA's organizing procedures are turned on their head in an organizing agreement.

Accordingly, enforcing § 302 to prohibit employers from materially assisting unions with organizing employees will serve only to protect the NLRA's "bottom-up" organizing process from being replaced with a private "top-down" process. This beneficial result is fully consistent with Congress' intent to prohibit top-down union organizing when amending § 302 to apply to unions that "seek[ ] to represent" an employer's employees. 29 U.S.C. § 186(a)(2); *see* p. 10, *supra*.

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can recognize unions that enjoy majority employee support without materially assisting their organizing campaigns.

[13] Unite's contention that enforcing § 302 against gag-clauses will somehow force employers to speak against unionization is baseless. (Pet. 18-19). Employers are free unilaterally to speak or not speak as they desire. Only when they grant a union contractual control over their communications is a "thing of value" delivered to a union in violation of § 302. *See Mulhall II*, 667 F.3d at 1216 (Pet. 8a-9a) (rejecting claim that "employers will be required to actively oppose unionization in order to avoid criminal sanctions under § 302").

III. THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THE CIRCUIT SPLIT AND DECIDING WHETHER AN ORGANIZING EXEMPTION SHOULD BE CARVED INTO § 302

Unite's petition fails to mention an issue that may bear on this Court's disposition of its petition. Mardi Gras has taken the position that the Agreement has expired by its terms. Unite contends that an arbitration decision extended the agreement's duration, and is currently seeking enforcement of the Agreement in *Unite Here Local 355*, Case No. 12-61135.

Irrespective of the Agreement's status, this case presents a case and controversy. Section 302(b)(1) makes it unlawful for Unite to "request" or "demand" a "thing of value" from Mardi Gras. 29 U.S.C. § 186(b)(1). Mardi Gras' agreement to deliver the assistance that Unite demands is not required for a violation. Given that Unite continues to request and demand that Mardi Gras provide it with "thing[s] of value" for organizing, this case remains ripe for review.

CONCLUSION

For these reasons, the petition satisfies the criteria for granting a writ of certiorari.

Respectfully submitted,

WILLIAM L. MESSENGER
Counsel of Record
c/o NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road
Suite 600
Springfield, VA 22160
(703) 321-8510
wlm@nrtw.org

Counsel for Martin Mulhall

REPLY BRIEF

Nos. 12-99 & 12-312

IN THE

Supreme Court of the United States

UNITE HERE LOCAL 355,
Petitioner and Respondent,
v.

MARTIN MULHALL,
Cross-Petitioner and Respondent,

and

HOLLYWOOD GREYHOUND TRACK, INC. d/b/a MARDI GRAS GAMING,
Respondent.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

CROSS-PETITIONER MARTIN MULHALL'S REPLY TO RESPONDENTS' BRIEFS IN RESPONSE TO THE CROSS-PETITION FOR CERTIORARI

WILLIAM L. MESSENGER
Counsel of Record
c/o NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road
Suite 600
Springfield, VA 22160
(703) 321-8510
wlm@nrtw.org

Counsel for Martin Mulhall

WILSON-EPES PRINTING CO., INC. (202) 789-0096 – WASHINGTON, D. C. 20002

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CROSS-PETITIONER MARTIN MULHALL'S REPLY TO RESPONDENTS' BRIEFS IN RESPONSE TO THE CROSS-PETITION FOR CERTIORARI

Cross-Petitioner Martin Mulhall hereby submits this reply to the briefs filed by Mardi Gras Gaming and Unite Here Local 355 in response to his cross-petition for certiorari.

1. Contrary to Mardi Gras' assertion, the expiration of the Memorandum of Agreement does not moot this case because Unite has not ceased its demands for the employer's assistance with unionizing Mulhall and his co-workers. Section 302(b)(1) of the Labor Management Relations Act makes it unlawful for unions to not only "agree" to accept a "thing of value" from employers—as Unite did in its Agreement with Mardi Gras—but also to "*request*" or "*demand*" a thing of value from employers. 29 U.S.C. § 186(b)(1) (emphasis added). Here, Mulhall alleges that Unite "has violated § 302(b)(1) by requesting and demanding that Mardi Gras deliver 'thing[s] of value' to [Unite] in the form of Information, Access, and a Gag Clause," Complaint, ¶ 37 (Dkt. 1), and seeks a "permanent injunction that enjoins [Unite] from . . . requesting, demanding, or receiving from Mardi Gras [these] things of value." *Id.* at Prayer for Relief (A)(1).

Notwithstanding the expiration of the Agreement, there is no evidence in the record that Unite has ceased its unlawful demands for these types of organizing assistance. Accordingly, Mardi Gras has not met its "heavy burden" of proving that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (citations omitted).

Nor could Mardi Gras satisfy its burden of proof. First, this case is before the Court on a motion to dismiss. The facts for purposes of the mootness inquiry are, therefore, those stated in the pleadings, which must be accepted as true. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). There is nothing in the Complaint, and hence the record, to support the proposition that Unite no longer seeks

from Mardi Gras information about its nonunion employees, use of its property for organizing, and control over its communications regarding unionization.

Second, this Court can take judicial notice that Unite is currently pursuing legal actions against Mardi Gras (1) to retroactively enforce provisions of the Agreement, *see Unite Here Local 355 v. Hollywood Greyhound Track, Inc. d/b/a/ Mardi Gras Gaming*, No. 12-CV-61135 (S.D. Fla. 2012),[1] and (2) that regard the union's attempts in late 2011 to access Mardi Gras' property and contact its employees at their homes, *see Hartman & Tyner, Inc., d/b/a Mardi Gras Casino & Hollywood Concessions, Inc.*, 2012 WL 4101899, JD(ATL)-21-12, pp. 4-5, 23-24 (NLRB Div. of Judges, Sept. 18, 2012). Unite also continues to actively litigate this case, having filed the original Petition for Certiorari here. These actions show that Unite does not consider its campaign against Mardi Gras' employees to be over or the subject matter of this suit to be moot.

In short, Mardi Gras has failed to prove that Unite no longer seeks its organizing assistance and that the threat to Mulhall's associational interests found by the Eleventh Circuit has abated. *See Mulhall v. Unite Here*, 618 F.3d 1279, 1286-89 (11th Cir. 2010) ("*Mulhall I*") (Pet. 42a-49a). Accordingly, this action continues to present a live case and controversy.

2. In its response brief, Unite agrees that Mulhall's cross-petition should be granted. However, it also reiterates its arguments on the merits from its petition for certiorari. These arguments, which are

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[1] Mardi Gras acknowledges that it is possible that an arbitrator will extend the duration of the Agreement as a result of this lawsuit. *See* Mardi Gras' Response Br., 4.

almost all inapposite to the narrow issue presented in the cross-petition, were rebutted in Mulhall's Response to the Petition for Certiorari, which is incorporated herein by reference.

For these reasons and those previously stated, the cross-petition for certiorari should be granted.

Respectfully submitted,

WILLIAM L. MESSENGER
Counsel of Record
c/o NATIONAL RIGHT TO
WORK LEGAL DEFENSE
FOUNDATION, INC.
8001 Braddock Road
Suite 600
Springfield, VA 22160
(703) 321-8510
wlm@nrtw.org

Counsel for Martin Mulhall

REPLY BRIEF

RECORD AND BRIEFS

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Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

UNITE HERE LOCAL 355's REPLY TO RESPONDENT MARDI GRAS GAMING'S BRIEF IN OPPOSITION

RICHARD G. MCCRACKEN*
ANDREW J. KAHN
PAUL L. MORE
DAVIS, COWELL & BOWE LLP
595 Market Street, Suite 1400
San Francisco, CA 94105
(415) 597-7200
rmccracken@dcbsf.com

Counsel for Respondent UNITE HERE Local 355

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

Petitioner UNITE HERE Local 355 submits this Reply to Respondent Mardi Gras Gaming's Brief in Opposition to the petitions. Mardi Gras argues that the union's petition in No. 12-99 and Mulhall's conditional cross-petition in No. 12-312 should be denied as moot, claiming that the neutrality agreement that Mulhall challenges has expired. But in collateral proceedings, the union and Mardi Gras are litigating Mardi Gras's obligation to arbitrate violations of that neutrality agreement. An arbitrator may well extend the term of the neutrality agreement as a remedy for those violations – two arbitrators have already done so. No court has held that Mardi Gras's contractual obligations have terminated.

Even if the neutrality agreement were currently expired and unenforceable, the relief that Mulhall seeks in his lawsuit goes beyond this particular agreement. Mulhall seeks a permanent injunction barring the union from ever "requesting" or "demanding" information about Mardi Gras employees, neutrality toward unionization, or access to Mardi Gras's facilities. App. 75.

The parties have an ongoing, concrete interest in Mulhall's § 302 claims.

SUPPLEMENTAL STATEMENT OF THE CASE

Mardi Gras and the union entered into the neutrality agreement in August 2004. App. 85. By its

terms, the agreement did not come into effect unless slot machines were installed and opened to the public at Mardi Gras's gaming facility. App. 85. Mardi Gras and the union agreed that once this occurred, the neutrality agreement would remain in effect for four years. App. 85.

Mardi Gras complied with the neutrality agreement for some time after it installed slot machines in December 2006. Beginning in 2008, however, it refused to supply the union with updated lists of its employees' names and addresses. When Mardi Gras refused to arbitrate this contractual violation, the union petitioned a federal district court to compel arbitration. *See* App. 38; *UNITE HERE Local 355 v. Hollywood Greyhound Track, Inc.*, Case No. 08-cv-61655 (S.D. Fla. 2008). The district court compelled Mardi Gras to arbitrate. App. 39. Arbitrator Arnold Zack subsequently held that: (1) Mardi Gras violated the neutrality agreement; (2) Mardi Gras first installed slot machines in December 2006; and (3) the proper remedy for Mardi Gras's violations was to extend the agreement's term for one year, to December 31, 2011.

Mardi Gras petitioned the district court to vacate this award, and the union moved to confirm it. The court confirmed the award in most respects. It refused to confirm the extension of the agreement's duration, holding that the parties had not given the arbitrator jurisdiction to award this remedy. *Hollywood Greyhound Race Track, Inc. v. UNITE HERE Local 355*, Case No. 09-cv-61760, Order (S.D. Fla. Aug. 6, 2010), at p. 6; *see* App. 39.

In 2009, Mardi Gras distributed flyers to its employees attacking the union and accusing union officials of greed and waste. Because this violated Mardi Gras's agreement to remain neutral, the union again sought arbitration. The parties held a hearing before Arbitrator Jerome Ross. Arbitrator Ross issued an award on April 23, 2010, holding that Mardi Gras violated the neutrality agreement by attacking the union. He ordered that the agreement's term be extended for one year beyond its expiration date as a remedy. The union subsequently petitioned to confirm this award, which a federal district court did on June 30, 2011. *UNITE HERE Local 355 v. Hollywood Greyhound Track, Inc.*, Case No. 11-cv-60047 (S.D. Fla. 2011).

Beginning in October 2011, Mardi Gras began interrogating employees about their union sympathies and attacking the union. In November 2011, Mardi Gras terminated ten employees who were known supporters of the union. Both actions violated the neutrality agreement. On November 15, 2011, the union sent a letter to Mardi Gras demanding arbitration. Mardi Gras refused to arbitrate these violations as well.

On June 7, 2012, the union petitioned to compel arbitration of the employer's October and November 2011 violations. *UNITE HERE Local 355 v. Hollywood Greyhound Track, Inc.*, Case No. 12-cv-61135 (S.D. Fla.). That action is pending.

REASONS FOR GRANTING THE WRITS

I. Mardi Gras Has Ongoing Obligations Under the Neutrality Agreement.

The most obvious problem with Mardi Gras's mootness argument is that it is currently litigating the status of the neutrality agreement in a different forum. "A case becomes moot only when it is impossible for a court to grant '"'any effectual relief whatever' to the prevailing party."'" *Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S.Ct. 2277, 2287 (2012) (quoting *Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000), in turn quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992)). "[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Ellis v. Railway Clerks*, 466 U.S. 435, 442 (1984). Mulhall and the union have a concrete interest in the outcome of Mulhall's litigation because Mardi Gras has ongoing obligations under the neutrality agreement.

Mardi Gras's most recent violations of the neutrality agreement are subject to arbitration, and an arbitrator will likely remedy these violations by extending the neutrality agreement's term. Violations of labor-management agreements that take place during the agreement's term are subject to post-expiration arbitration. *Nolde Bros. v. Local 358, Bakery Workers*, 430 U.S. 243, 251 (1977); *Litton Financial Printing v. NLRB*, 501 U.S. 190, 205-06 (1991). Mardi Gras's most recent violations took place

while the neutrality agreement was still in effect. It is therefore irrelevant whether the agreement "expired by its own terms prior to the Petition for Writ of Certiorari." *Cf.* Mardi Gras Opp. Br., at 3.

In the union's pending action to compel arbitration, Mardi Gras argues that the neutrality agreement in fact expired in October 2011, prior to its violations. *See* Mardi Gras Opp. Br., at 3. But the neutrality agreement contains a broad arbitration clause, covering "any disputes over [its] interpretation or application[.]" App. 84. The question of whether the neutrality agreement had expired at the time of Mardi Gras's October and November 2011 violations is a matter of contract interpretation for an arbitrator. *Howsam v. Dean Witter Reynolds Inc.*, 537 U.S. 79, 85 (2002); *see, e.g.*, *UNITE HERE Local 217 v. Sage Hospitality Resources*, 642 F.3d 255, 262 (1st Cir. 2011); *Abram Landau Real Estate v. Bevona*, 123 F.3d 69, 74 (2nd Cir. 1997); *Houston General Ins. Co. v. Realex Group, N.V.*, 776 F.2d 514, 516-17 (5th Cir. 1985); *McKinney v. Emery Air Freight*, 954 F.2d 590 (9th Cir. 1992); *Montgomery Mailers' Union No. 127 v. Advertiser Co.*, 827 F.2d 709, 713-14 (11th Cir. 1987).[1]

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[1] Regardless of whether a court or arbitrator decides the issue, Mardi Gras is unlikely to prevail in its argument that the neutrality agreement expired in October 2011. A previous arbitration award – confirmed by a federal district court – held that the agreement ran through December 31, 2010. *Hollywood Greyhound Race Track, Inc. v. UNITE HERE Local 355*, Case No. 09-cv-61760 (S.D. Fla. 2010). A subsequent award – also confirmed by a federal district court – extended that expiration

(Continued on following page)

A central purpose of the agreement is to ensure the employer's neutrality toward unionization during any organizing drive. An arbitrator is likely to remedy Mardi Gras's violations of its neutrality pledge by extending the agreement's term, as two arbitrators have done previously.[2] In any case, no court or arbitrator has held that Mardi Gras's obligations under the neutrality agreement have ceased.

Mardi Gras admits that the neutrality agreement is far from a dead letter, and that further arbitration and the extension of the agreement's term are possible. Mardi Gras Opp. Br., at 4. This is a concession that the petition is not moot.[3]

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date for one year to remedy Mardi Gras's violations. *UNITE HERE Local 355 v. Hollywood Greyhound Track, Inc.*, 11-cv-60047 (S.D. Fla. 2011). Those decisions are *res judicata*.

[2] The propriety of this remedy as a way to help restore the benefit of a bargain is well-established. *See, e.g.*, *Levitt Corp. v. Levitt*, 593 F.2d 463, 469 (2nd Cir. 1979); *Capelouto v. Orkin Exterminating Co. of Fla., Inc.*, 183 So.2d 532, 534 (Fla. 1966).

[3] *Local No. 8-6, Oil, Chemical and Atomic Workers International Union v. Missouri*, 361 U.S. 363, 366 (1960) is obviously distinguishable. *Cf.* Mardi Gras Opp. Br., at 4. There, the Court held that the parties' separate litigation of different legal issues did not rescue the moot challenge to an indisputably expired injunction. Here, the collateral proceedings address whether the neutrality agreement is expired or enforceable at all.

II. Mulhall Seeks to Enjoin the Union From Requesting or Demanding Any Future Neutrality Agreement.

The relief that Mulhall requests goes beyond the existing neutrality agreement. Mulhall seeks an order enjoining the union from ever "*requesting*, *demanding*, or receiving" information about Mardi Gras's employees, access to Mardi Gras's property, or Mardi Gras's neutrality on the question of its employees' choice regarding union representation. App. 75 (emphasis added). Mulhall also requests declaratory judgment that each of these is a "thing of value" under § 302. App. 75. Mulhall wants not just to invalidate a particular neutrality agreement, but to prohibit the union from ever "demanding" Mardi Gras's agreement to one again in the future.

Accordingly, even if Mulhall's request for an injunction against enforcement of the neutrality agreement were mooted by that agreement's expiration, Mulhall's lawsuit – and therefore the union's petition – would not be moot. *See, e.g.*, *Powell v. McCormack*, 395 U.S. 486, 499-00 (1969) (mootness of "primary" relief sought did not moot entire case if other forms of relief available); *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 121-22 (1974) (district court had a duty to decide the merits of the declaratory judgment claim even though the request for an injunction had become moot).

CONCLUSION

For the foregoing reasons, the petitions are not moot. The Court should grant them.

Respectfully submitted,

RICHARD G. MCCRACKEN*
ANDREW J. KAHN
PAUL L. MORE
DAVIS, COWELL & BOWE LLP
595 Market Street, Suite 1400
San Francisco, CA 94105
(415) 597-7200
rmccracken@dcbsf.com

Counsel for Respondent
UNITE HERE Local 355

**Counsel of Record*

December 4, 2012

REPLY BRIEF

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On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER UNITE HERE LOCAL 355's REPLY TO BRIEF FOR UNITED STATES AS AMICUS CURIAE

RICHARD G. MCCRACKEN*
ANDREW J. KAHN
PAUL L. MORE
DAVIS, COWELL & BOWE LLP
595 Market Street, Suite 1400
San Francisco, CA 94105
(415) 597-7200
rmccracken@dcbsf.com

Counsel for UNITE HERE Local 355

**Counsel of Record*

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OR CALL COLLECT (402) 342-2831

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PETITIONER'S REPLY TO BRIEF FOR UNITED STATES AS AMICUS CURIAE

The Solicitor General agrees with Petitioner that a split among the circuits exists on the important question of whether an employer violates Section 302 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186, by entering into a labor-management agreement under which the employer agrees to remain neutral and provide the union access to its employees and facilities. The Solicitor General recognizes that the Eleventh Circuit "went astray" in its treatment of this question and that its decision was "troubling" and "unsound." United States Br. *Amicus Curiae* ("Solicitor General Br."), at 9, 14. The Solicitor General also recognizes that the Eleventh Circuit's approach "would infringe on the role of the NLRB" in policing "standard card-check, access, and neutrality agreements." *Id.* at 14. As the Third Circuit held, accepting the theory that the Eleventh Circuit did "would wreak havoc on the carefully balanced structure of the laws governing recognition of and bargaining with unions." *Hotel & Restaurant Employees Union Local 57 v. Sage Hospitality Resources LLC*, 390 F.3d 206, 219 (3d Cir. 2004).

Yet the Solicitor General urges the Court to deny the petition and allow the Eleventh Circuit's erroneous interpretation of Section 302 to "percolate" in the lower courts. The reasons that the Solicitor General provides for waiting are not well-taken. Review is necessary to settle a circuit split over an issue that goes to the heart of cooperative labor-management

relations. It is also necessary to prevent uncertainty over whether employers and union officials commit a felony when they enter into a common type of labor-relations agreement. The petition is not moot because Petitioner UNITE HERE Local 355's right to enforce the agreement through arbitration depends on the outcome of this case. The Court should grant the petition.

I. REVIEW IS NECESSARY TO SETTLE A CIRCUIT SPLIT ON AN ISSUE OF IMPORTANCE AND PREVENT UNCERTAINTY OVER EMPLOYERS' AND UNION OFFICIALS' EXPOSURE TO CRIMINAL LIABILITY.

1. Neutrality agreements like the one at issue in this case are a common form of cooperative labor-management relations. *See* Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 INDUS. & LAB. REL. REV. 42, 43 (2001); Solicitor General Br., at 9-10. They typically include the types of clauses that the Eleventh Circuit held to be "things of value," the "payment" of which may be prohibited by Section 302. *See* Eaton & Kriesky, *supra*, at 47-48 (nearly 93% of organizing agreements surveyed included clauses requiring employer neutrality; two-thirds included clauses granting expanded access to the employer's property; and one-third gave union the right to employee lists). Similar requirements are commonplace in collective-bargaining agreements and have consistently been upheld by the federal courts, including over Section

302 challenges. Pet., at 16-22. If, as the Eleventh Circuit concluded, the clauses challenged here are "things of value" within the meaning of Section 302 and a "payment" is an action that merely "fulfills an obligation" to another party, then most collective-bargaining agreements are criminal. *See* Pet. App., at 7-8. The Eleventh Circuit's decision cannot be reconciled with either Section 301 of the LMRA or with Section 302's language. Pet., at 15; Response to Conditional Cross-Pet., at 10-15.

The Solicitor General is correct that the Eleventh Circuit "went astray" in concluding that facility access, employee lists, and employer neutrality are "things of value" and that their exchange may be criminal depending on the parties' intent. Solicitor General Br., at 9. The Solicitor General points out that the Eleventh Circuit's approach is unsound because LMRA Sections 302(a)(2) and (b)(1) "are prophylactic bans on certain practices that do not require a specific intent to corrupt a union or to extort a benefit from an employer." Solicitor General Br., at 14. As this implicitly recognizes, the Eleventh Circuit's decision creates an additional intra- and inter-circuit split by interpreting liability under Sections 302(a)(2) and (b)(1) to be dependent on the parties' intent or purpose. *Cf. United States v. Ryan*, 350 U.S. 299, 305 (1956) ("As the statute reads, it appears to be a criminal provision, *malum prohibitum*, which outlaws all payments, with stated exceptions, between employer and representative."); *United States v. Cody*, 722 F.2d 1052, 1059 (2d Cir. 1983) ("Plainly,

the employer's purpose for making a payment is irrelevant since all payments, aside from those statutorily excluded, are unlawful."); *United States v. Pecora*, 484 F.2d 1289, 1294 (3d Cir. 1973) (no "corrupt purpose" necessary for a violation of section 302); *United States v. Carter*, 311 F.2d 934, 943 (6th Cir. 1963), *cert. denied*, 373 U.S. 915; *United States v. Bloch*, 696 F.2d 1213, 1216 (9th Cir. 1982), *abrogated on other grounds by United States v. Jimenez Recio*, 537 U.S. 270, 277 (2003); *United States v. Phillips*, 19 F.3d 1565, 1581-82 (11th Cir. 1994), *cert. denied*, 514 U.S. 1003 (1995); *but see United States v. Papia*, 910 F.2d 1357, 1362 (7th Cir. 1990) (willfulness requires "an awareness of or reckless disregard for" Section 302's restrictions).

The Solicitor General also recognizes that the Eleventh Circuit's interpretation of Section 302 threatens to place fundamental questions of national labor policy into the hands of juries applying a narrow anti-corruption statute. Solicitor General Br., at 14 (the Eleventh Circuit's decision threatens to "infringe on the role of the NLRB" in policing neutrality agreements). Under the Eleventh Circuit's broad approach to Section 302 standing, any employee who opposes an employer's neutrality toward unionization – or who dislikes the bargain a union has struck with an employer – may now challenge that decision as the improper "payment" of a "thing of value." *See* Pet. App., at 34-60.

2. The Solicitor General argues, however, that the Court should not grant certiorari, but should wait

for the Eleventh Circuit's decision to "percolate" in the lower courts. Solicitor General Br., at 15. None of the reasons that the Solicitor General cites for waiting are well-taken; in fact, they are inconsistent with the Solicitor General's critique of the Eleventh Circuit's decision. There are compelling reasons for the Court to promptly settle the circuit splits that the Eleventh Circuit created.

Section 302 is a criminal statute, and violating it is a felony. 29 U.S.C. § 186(d). According to the Eleventh Circuit, an employer's promise of neutrality toward a union's organizing efforts can be a crime if a jury later determines that the employer's intent in making the promise was illegitimate or "corrupting." This substantially burdens employers' First Amendment rights, and puts pressure on them to oppose unionization, even if they do not want to. *See Virginia v. Hicks*, 539 U.S. 113, 119 (2003); *United States v. Poindexter*, 951 F.2d 369, 378 (D.C. Cir. 1991) ("We must acknowledge that, on its face the word 'corruptly' is vague; that is, in the absence of some narrowing gloss, people must 'guess at its meaning and differ as to its application.'").[1] The threat of criminal

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[1] It is no answer that prosecutors in the Eleventh Circuit or other circuits in which the issue has not been addressed might not choose to enforce Section 302 against employers who agree to be neutral. Courts will not rely on "prosecutorial discretion" to ensure that a statute does not ensnare those beyond its proper confines. *See Baggett v. Bullitt*, 377 U.S. 360, 373-374 (1964) ("It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful . . . prosecution for some

(Continued on following page)

liability can be expected to severely curtail employers' and unions' willingness to enter into agreements that foster voluntary recognition – a "favored element of national labor policy"[2] – in those circuits in which the law is unclear. It is true that "substantial uncertainty surrounds the scope" of the Eleventh Circuit's decision and that the "decision does not clarify what circumstances would violate Section 302." Solicitor General Br., at 15. But in the context of a criminal statute of potentially expansive application, this is a reason to grant certiorari, not to deny it.

The Solicitor General argues that review is not warranted because this is an interlocutory petition from the Eleventh Circuit's reversal of an order dismissing the case. Solicitor General's Br., at 16. But this Court often reviews interlocutory decisions that are based on faulty interpretations of statutory schemes with potentially far-reaching implications. *See, e.g., F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 159-60 (2004); *Cent. Bank of Denver N.A. v. First Interstate Bank of Denver*, 511 U.S. 164, 170 (1994); *Santa Fe Indus. v. Green*, 430 U.S. 462, 468-71 (1977). As the Solicitor General points out, the

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of the activities seemingly embraced within the sweeping statutory definitions"); *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 599 (1967) ("It is no answer to say that the statute would not be applied in such a case.").

[2] *NLRB v. Broadmoor Lumber Co.*, 578 F.2d 238, 241 (9th Cir. 1978); *NLRB v. Lyon & Ryan Ford, Inc.*, 647 F.2d 745, 750 (7th Cir. 1981), *cert. denied*, 454 U.S. 894.

Eleventh Circuit's errors here were to interpret facility access, employee lists, and employer neutrality as "things of value" that can be "paid" under Section 302 and – contrary to its own circuit precedent and that of four other circuits – to make an employer's liability hinge on some undefined "intent to corrupt." There is no "additional factual development" that will further "crystalize the parties' claims" in this regard, or alter the Eleventh Circuit's erroneous interpretation of Section 302's scope. *Cf.* Solicitor General Br., at 16. Moreover, the challenged clauses are common to most neutrality agreements. Employer "neutrality" essentially defines agreements on organizing ground-rules, which is why they are often referred to as "neutrality agreements." So it does not make sense to wait to "allow the courts to consider the application of Section 302 to *different* types of promises in voluntary recognition agreements." *Id.* at 15 (emphasis supplied).

The Eleventh Circuit's decision conflicts with those of at least five other circuits and threatens grave damage to both the LMRA's statutory scheme and cooperative labor-management relations. The Court should not wait to grant certiorari.

II. THIS CASE IS NOT MOOT BECAUSE PETITIONER'S RIGHT TO ENFORCE THE NEUTRALITY AGREEMENT DEPENDS ON THIS CASE'S OUTCOME.

The Solicitor General submits that "the agreement is no longer in force," so this case "may well be moot." Solicitor General Br., at 16, 17. Neither assertion is correct. *See* Petitioner's Reply to Respondent Mardi Gras Gaming's Opp. Br., at 4-7.

In the labor-relations context, expiration of a collective-bargaining agreement does not terminate contractual rights and obligations that arose during the agreement's term. The obligation to arbitrate survives expiration where, as here, "the dispute arose during the life of the contract but arbitration proceedings had not begun before termination. The same would be true if arbitration processes began but were not completed, during the contract's term." *Nolde Bros., Inc. v. Local 358, Bakery & Confectionary Workers Union*, 430 U.S. 243, 251 (1977), *citing John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964); *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 205-06 (1991); *see also South Bay Boston Mgmt., Inc. v. Unite Here, Local 26*, 587 F.3d 35, 42-43 (1st Cir. 2009) (applying *Nolde* in context of arbitration under expired neutrality agreement).

Mardi Gras Gaming's failure to abide by its contractual promise to provide the Union with the names and addresses of its employees indisputably occurred during the neutrality agreement's term. So did its

more recent violations of the agreement's neutrality clause. Petitioner's Reply to Respondent Mardi Gras Gaming's Opp. Br., at 4-5. It is therefore inaccurate to say that the neutrality agreement is "no longer in force" – it continues to obligate the parties to arbitrate disputes that arose prior to expiration involving the challenged clauses. An unfavorable decision on the agreement's validity under Section 302 would deprive the Union of its continuing right to arbitrate such disputes and to seek a remedy for Mardi Gras Gaming's violations. This is enough to defeat any claim to mootness. *Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S.Ct. 2277, 2287 (2012) ("A case becomes moot only when it is impossible for a court to grant '"'any effectual relief whatever' to the prevailing party."'") (internal citations omitted); *Ellis v. Bhd. of Railway, Airline & Steamship Clerks*, 466 U.S. 435, 442 (1984) ("[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot."). Accordingly, the district court that is adjudicating the Union's motion to compel arbitration has stayed proceedings, noting that "the issue regarding the legality of the Memorandum of Agreement between the parties is currently pending." *Unite Here Local 355 v. Hollywood Greyhound Track Inc.*, Case No. 0:12-cv-61135-RSR, Docket No. 11, Order Granting Mot. to Stay 1-2 (S.D. Fla. Dec. 20, 2012).

The remedy that the Union will seek in any eventual arbitration will be the extension of the neutrality agreement's terms. Two arbitrators have

already imposed this remedy for Mardi Gras Gaming's violations, so it is not "speculative" that another arbitrator finding a violation will also extend the agreement's term. *See* Petitioner's Reply to Respondent Mardi Gras Gaming's Opp. Br., at 2-3; *cf.* Solicitor General Br., at 18. To defeat mootness, however, it is enough that the Union has an ongoing right to demand that an arbitrator adjudicate the parties' dispute and that this right is directly affected by the lower courts' view of the neutrality agreement's validity.

Local No. 8-6, Oil, Chemical & Atomic Workers v. Missouri, 361 U.S. 363 (1960) is not analogous. There, the Governor exercised his discretion under a state statute by taking possession of a public utility during a strike. This Court held the controversy to be moot because both the seizure and the strike had terminated prior to the time the case reached the Court. *Id.* at 370-71. The case's mootness was readily apparent because "although the union had sought both declaratory and injunctive relief, the decision the Court was asked to review 'upheld only the validity of an injunction, an injunction that expired by its own terms more than three years ago.'" *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 123 (1974) (quoting *Oil Workers*, 361 U.S. at 371).

This case is not like *Oil Workers* because there remains a live, ongoing dispute over the neutrality agreement's enforceability. *Cf. Div. 1287 of Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees of Am. v. State of Mo.*, 374 U.S. 74, 77-78

(1963) ("In the *Oil Workers* case . . . the underlying labor dispute had been settled and new collective bargaining agreements concluded by the time the litigation reached this Court. Here, by contrast, the labor dispute remains unresolved. There thus exists in the present case not merely the speculative possibility of invocation of the King-Thompson Act in some future labor dispute, but the presence of an existing unresolved dispute which continues subject to all the provisions of the Act."); *Buffalo Forge Co. v. United Steelworkers of America*, 428 U.S. 397, 403 n. 8 (1976) (expiration of collective-bargaining agreement did not moot case where the dispute arose during agreement's term). The Union's action to compel arbitration under the agreement is not some "collateral litigation" that the Union hopes to indirectly benefit through this litigation. *Cf.* Solicitor General Br., at 18. The Solicitor General argues that the neutrality agreement has expired and is "no longer in force." But *Nolde* and its progeny give the Union an ongoing right to compel arbitration over violations that occurred during the agreement's term.

CONCLUSION

This Court should not wait to resolve the circuit splits created by the Eleventh Circuit's decision. The petition for certiorari should be granted.

Respectfully submitted,

RICHARD G. MCCRACKEN
Counsel of Record
ANDREW J. KAHN
PAUL L. MORE
DAVIS, COWELL & BOWE LLP
595 Market Street, Suite 1400
San Francisco, CA 94105

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AMICUS CURIAE BRIEF

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Nos. 12-99 and 12-312

In the Supreme Court of the United States

UNITE HERE LOCAL 355, PETITIONER

v.

MARTIN MULHALL, ET AL.

MARTIN MULHALL, PETITIONER

v.

UNITE HERE LOCAL 355, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
MYTHILI RAMAN
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
NICOLE A. SAHARSKY
Assistant to the Solicitor General
JOHN M. PELLETTIERI
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether an employer's compliance with a voluntary recognition agreement between the employer and a labor union, in which the employer agrees to remain neutral on the question of unionization and to provide the union with access to its employees and facilities, violates Section 302 of the Labor Management Relations Act, 29 U.S.C. 186.

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In the Supreme Court of the United States

No. 12-99

UNITE HERE LOCAL 355, PETITIONER

v.

MARTIN MULHALL, ET AL.

No. 12-312

MARTIN MULHALL, PETITIONER

v.

UNITE HERE LOCAL 355, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari in No. 12-99 and the conditional cross-petition for a writ of certiorari in No. 12-312 should be denied.

STATEMENT

1. This case concerns the reach of Section 302 of the Labor Management Relations Act (LMRA or Act), commonly known as the Taft-Hartley Act. Section 302 of the Act makes it a crime "for any employer * * * to

pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value * * * to any labor organization," or officer or employee of such an organization, that seeks to represent the employer's employees. 29 U.S.C. 186(a)(2). The Act also makes it a crime for a labor union "to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a)." 29 U.S.C. 186(b)(1).[1]

The purpose of Section 302 is to stop "corruption of collective bargaining through bribery of employee representatives by employers," "extortion by employee representatives," and "abuse [of power] by union officers." *Arroyo* v. *United States*, 359 U.S. 419, 425-426 (1959).

2. It is well-settled that employers and labor unions may enter into voluntary recognition agreements to facilitate labor-management relations. Under a "card-check" agreement, an employer agrees to recognize a union based on a showing of support in the form of cards signed by a majority of employees, rather than through a secret ballot election overseen by the National Labor Relations Board (NLRB). See Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 Indus. & Lab. Rel. Rev. 42, 43, 46-48 (2001). An employer also may make a promise of "neutrality" during a union organizing campaign, pledging not to oppose its employees' unionization. See *ibid.* And the employer may agree to other ground rules for an organizing campaign, such as that the employer will permit the union to speak with employees or have access to the employer's property. See, *e.g.*, *Adcock* v. *Freight-*

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[1] These prohibitions are subject to limited exceptions that are not at issue here. See 29 U.S.C. 186(c).

liner LLC, 550 F.3d 369, 374-375 (4th Cir. 2008), cert. denied, 558 U.S. 932 (2009).

Courts have long enforced these types of voluntary recognition agreements. See, *e.g.*, *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 595-598 (1969); *International Union* v. *Dana Corp.*, 278 F.3d 548, 553-554, 558-559 (6th Cir. 2002). The NLRB has upheld the validity of such agreements, see, *e.g.*, *MGM Grand Hotel, Inc.*, 329 N.L.R.B. 464, 466 (1999), and it has found that employers have acted unlawfully when they fail to adhere to such agreements, see, *e.g.*, *NLRB* v. *Creative Food Design Ltd.*, 852 F.2d 1295, 1297-1298 (D.C. Cir. 1988). See also p. 10, *infra*.

3. Petitioner Unite Here Local 355 (Unite Here) is a labor union that seeks to become the collective bargaining representative for the employees of respondent Mardi Gras Gaming (Mardi Gras), a gaming company in Florida. Pet. App. 14, 65.[2] Respondent Martin Mulhall is an employee of Mardi Gras who opposes unionization. *Id.* at 3, 14-15, 64.

a. In 2004, Mardi Gras and Unite Here entered into an agreement in which Mardi Gras agreed to recognize the union as the collective bargaining representative of its employees based on a card-check procedure, rather than through an NLRB secret ballot election. Pet. App. 2, 81. Mardi Gras also agreed to provide the union with access to Mardi Gras premises; to provide the union with lists of employee names and addresses; and to remain neutral during the union's organizing campaign. *Id.* at 79-81. In return, Unite Here agreed not to "engage in a strike, picketing or other economic activity" at a Mardi Gras facility during the life of the agreement.

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[2] References to the "Pet. App." are to the appendix to the petition in No. 12-99.

Id. at 82. Mardi Gras and Unite Here agreed to arbitrate any disputes arising out of the agreement. *Id.* at 84. By its terms, the agreement would take effect when slot machines were installed at Mardi Gras gaming facilities and would remain in effect for four years or until Unite Here negotiated a collective bargaining agreement on behalf of Mardi Gras employees, whichever occurred first. *Id.* at 85.

Unite Here also promised Mardi Gras "to expend monetary and other resources to support a ballot proposition favored by Mardi Gras." Pet. App. 2-3, 66. Unite Here spent over $100,000 on a campaign to support a Florida ballot initiative to permit installation of slot machines at gaming facilities like those operated by Mardi Gras. See *id.* at 3, 38-39.

b. In 2006, the ballot initiative passed and Mardi Gras installed slot machines at its facilities, thereby triggering the agreement. Pet. App. 14, 38. Unite Here requested that Mardi Gras comply with the agreement. *Id.* at 38; see Arbitration Op. & Dec. 11 (Aug. 6, 2009) (0:12-cv-61135-RSR Docket entry No. 1-6 (S.D. Fla. June 7, 2012)) (Arbitration Op.).

Mardi Gras complied with the agreement in 2006 and 2007 but refused to provide an updated employee list in 2008. Pet. App. 14, 38. The union sought to enforce the agreement through arbitration. *Id.* at 14. Mardi Gras argued that the agreement was unenforceable because compliance with it would violate 29 U.S.C. 186. Pet. App. 14-15. The arbitrator disagreed and concluded that the agreement was enforceable. See Arbitration Op. 7-12. Mardi Gras challenged the arbitrator's award in federal district court; the district court confirmed that the agreement was enforceable. See Order 8 (S.D.

Fla. Aug. 6, 2010) (0:09-cv-61760-WJZ Docket entry No. 38).

In 2009, Mardi Gras distributed a flier to its employees about the union that the union believed violated the neutrality agreement, and the union initiated arbitration. See Op. & Award 1-2 (Apr. 23, 2010) (0:12-cv-61135-RSR Docket entry No. 1-7, at 1-2 (S.D. Fla. June 7, 2012)). The arbitrator concluded that Mardi Gras had violated the agreement's neutrality provision and ordered, as a remedy, that the agreement be extended by one year. *Id.* at 6-8. The district court confirmed the enforceability of the arbitration award. See Order of Final J. Confirming Arbitration Award 1-2 (S.D. Fla. June 30, 2011) (0:11-cv-60047-WJZ Docket entry No. 11).

In November 2011, the union again sought to compel arbitration, contending that Mardi Gras had violated the agreement by making negative comments about the union and by firing ten union activists. Compl. to Compel Arbitration 4-5 (S.D. Fla. June 7, 2012) (0:12-cv-61135-RSR Docket entry No. 1) (Compl.). Mardi Gras responded that the agreement had expired on October 24, 2011. Answer 4 (S.D. Fla. Oct. 30, 2012) (0:12-cv-61135-RSR Docket entry No. 6). The union contended that the agreement did not expire until December 31, 2011. See Compl. 4. The district court has stayed proceedings in that case pending the outcome of this case. See Order on Mot. to Stay 1-2 (S.D. Fla. Dec. 20, 2012) (0:12-cv-61135-RSR Docket entry No. 11).

4. In the meantime, Mulhall filed this lawsuit in federal district court, seeking injunctive and declaratory relief to prevent enforcement of the agreement. He contended that by complying with the terms of the agreement, Mardi Gras would be "pay[ing], lend[ing], or

deliver[ing]" a "thing of value" to the union in violation of 29 U.S.C. 186(a)(2). Pet. App. 63-65, 67-68. He also contended that by asking the employer to abide by the agreement, the union "request[ed]" and "demand[ed]" a prohibited "thing of value" in violation of 29 U.S.C. 186(b)(1). See Pet. App. 74.[3]

As relevant here, the district court dismissed the complaint for failure to state a violation of 29 U.S.C. 186. Pet. App. 13-23. The court held that "the assistance promised in the [agreement] does not constitute a thing of value" within the meaning of 29 U.S.C. 186. Pet. App. 13. The court noted that two courts of appeals had addressed this issue and concluded that labor-management agreements like the one at issue did not involve delivery of prohibited things of value. See *id.* at 17-19 (citing *Adcock* v. *Freightliner LLC*, *supra*, and *Hotel Emps. & Rest. Emps. Union, Local 57* v. *Sage Hospitality Res., LLC*, 390 F.3d 206 (3d Cir. 2004), cert. denied, 544 U.S. 1010 (2005)). The court explained that "the purpose behind Congress's enactment of § 302" was to prevent corruption of and extortion by union officers, and in this case the court found "no indication of [such] corruption or bribery of Unite Here officials." Pet. App. 18-19.

5. The court of appeals reversed and remanded. Pet. App. 1-9. The court stated that "organizing assistance can be a thing of value that, if demanded or given as payment, could constitute a violation of" 29 U.S.C. 186.

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[3] The district court dismissed Mulhall's complaint for lack of standing, Pet. App. 24-33, and the court of appeals reversed, *id.* at 34-60. The court of appeals declined to address whether 29 U.S.C. 186 provides a private right of action and whether "the disputed organizing assistance is a 'thing of value,' whose provision by Mardi Gras or acceptance by [Unite Here] would violate" the statute. Pet. App. 59-60.

Pet. App. 2. The court first noted that the term "thing of value" generally includes both "tangibles and intangibles." *Id.* at 4-5 (citation omitted).[4] The court then observed that the statute requires a "payment, loan, or delivery," and it stated that while "intangible assistance cannot be loaned or delivered," it can constitute a "payment" under the statute if "its performance fulfills an obligation." *Id.* at 7-8.

The court then focused on the purposes behind the statute—"curbing bribery and extortion"—and concluded that "an employer's decision to remain neutral or cooperate during an organizing campaign does not constitute a § 302 violation unless the assistance is an improper payment." Pet. App. 8-9. The court recognized that "[e]mployers and unions may set ground rules for an organizing campaign, even if the employer and union benefit from the agreement." *Id.* at 8. In the court's view, however, "innocuous ground rules can become illegal payments if used as valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer." *Ibid.*

The court therefore held that Mulhall has stated a claim for relief, and it remained for the district court to "determine the reason why Unite and Mardi Gras agreed to cooperate with one another." Pet. App. 9.

Judge Restani dissented. Pet. App. 9-12. In her view, complying with the agreement would not violate Section 302, and "an improper intent on behalf of the union or employer in demanding or offering the types of concessions at issue" does not "transform[] an otherwise 'innocuous' concession into a bribe or constitute[] extortion" in violation of the statute. *Id.* at 9-10. Judge

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[4] The court expressly declined to consider whether a "thing of value" must have "monetary value." Pet. App. 8.

Restani noted that the purpose of the statute is to promote collective bargaining, and that purpose would be thwarted if the employer and union could not agree to ground rules for an organizing campaign. *Id.* at 10-11. Judge Restani also noted that Mulhall's complaint fails even under the standard adopted by the majority, because he "ma[de] no allegations of wrongdoing relating to the formation of the Agreement or Unite's motives at the time of contracting." *Id.* at 11.

6. Unite Here and Mardi Gras both filed petitions for rehearing en banc. The United States submitted a brief as amicus curiae in support of rehearing en banc. While recognizing that the decision below was interlocutory and that the complaint might be dismissed on remand, the United States indicated that the court of appeals had erred in importing a specific intent inquiry into Section 302(a)(2) and (b)(1) and that its decision had the potential to burden labor relations and intrude upon the jurisdiction of the NLRB. See U.S. En Banc Br. 6-15. The court denied rehearing, with no judge in regular active service requesting that the court be polled about rehearing en banc. Pet. App. 61-62.

DISCUSSION

Unite Here and Mulhall both seek review of the court of appeals' decision, in which the court (1) held that employers and unions generally may agree to set ground rules for union organizing campaigns but also that, under certain circumstances, compliance with such an agreement could violate 29 U.S.C. 186, and (2) remanded for an inquiry into the reasons why the parties entered into the agreement at issue in this case. See 12-99 Pet. 7-30; 12-312 Cross-Pet. 5-6. In the government's view, the court of appeals correctly recognized that "[e]mployers and unions may set ground rules for an

organizing campaign" and that such agreements do not violate Section 302 "even if the employer and union benefit from the agreement." Pet. App. 8. But the court of appeals went astray in concluding that the legitimacy of such agreements turns on an inquiry into the parties' intent. *Id.* at 8-9. Such a test provides little guidance and has the potential to undermine the NLRB's role in adjudicating labor disputes. The only two other circuits that have addressed the issue have upheld neutrality agreements against challenges under Section 302 without suggesting that courts must go behind the nature of the agreements to ascertain whether they represent an "improper payment." *Id.* at 9.

While the decision below is therefore troubling, this Court's intervention is not warranted at this time or in this case. Only three courts of appeals have addressed the underlying issues, and further consideration in the lower courts would benefit this Court should review eventually be justified. Further, the contours and implications of the court of appeals' holding are uncertain. Because the case is in an interlocutory posture, further proceedings on remand may clarify the decision's effects. Finally, because the challenged agreement is no longer in force, a substantial question of mootness exists that could prevent this Court from reaching the merits. Under those circumstances, the petition and cross-petition should be denied.

1. Voluntary recognition of a union "predates the National Labor Relations Act and is undisputedly lawful under it." *Lamons Gasket Co.*, 357 N.L.R.B. No. 72, 2011 WL 3916075, at *4-*5 (Aug. 26, 2011) (internal citation omitted). "Voluntary recognition is a favored element of national labor policy" because it minimizes labor-management strife. *NLRB* v. *Broadmoor Lumber*

Co., 578 F.2d 238, 241 (9th Cir. 1978); see also, *e.g.*, *NLRB* v. *Lyon & Ryan Ford, Inc.*, 647 F.2d 745, 750 (7th Cir.), cert. denied, 454 U.S. 894 (1981); *NLRB* v. *Broad St. Hosp. & Med. Ctr.*, 452 F.2d 302, 305 (3d Cir. 1971).

As a prelude to possible voluntary recognition, unions and employers commonly agree to ground rules for organizing and recognition, such as a card-check procedure, access rights, and a neutrality policy. See Pet. App. 78-82 (agreement in this case). The NLRB has routinely upheld voluntary recognition and ground-rules agreements of this sort as permissible under the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*[5] The NLRB also has found that employers have committed unfair labor practices when they fail to adhere to such agreements.[6] Further, the federal courts (which have jurisdiction to enforce agreements between unions and employers under 29 U.S.C. 185) have routinely enforced voluntary recognition agreements.[7]

Section 302 of the LMRA makes it a crime for an employer to "pay, lend, or deliver, or agree to pay, lend, or

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[5] See, *e.g.*, *MGM Grand Hotel, Inc.*, 329 N.L.R.B. 464, 466 (1999); *Cam Indus., Inc.*, 251 N.L.R.B. 11, 11-12 (1980), enforced, *N.L.R.B.* v. *Cam Indus, Inc.*, 666 F.2d 411, 412-413 (9th Cir. 1982); *Snow & Sons*, 134 N.L.R.B. 709 (1961), enforced, *Snow* v. *NLRB*, 308 F.2d 687, 689-690, 695 (9th Cir. 1962).

[6] See, *e.g.*, *NLRB* v. *Creative Food Design Ltd.*, 852 F.2d 1295, 1297-1298 (D.C. Cir. 1988); *Cayuga Crushed Stone, Inc.*, 195 N.L.R.B. 543, 544, 546 (1972), enforced, *NLRB* v. *Cayuga Crushed Stone, Inc.*, 474 F.2d 1380, 1384 (2d Cir. 1973).

[7] See, *e.g.*, *Hotel & Rest. Emps. Union Local 217* v. *J.P. Morgan Hotel*, 996 F.2d 561, 563, 568 (2d Cir. 1993); *Hotel Emps., Rest. Emps. Union, Local 2* v. *Marriott Corp.*, 961 F.2d 1464, 1467-1468, 1470 (9th Cir. 1992); *Amalgamated Clothing & Textile Workers Union, AFL-CIO* v. *Facetglas, Inc.*, 845 F.2d 1250, 1252-1253 (4th Cir. 1988).

deliver, any money or other thing of value" to a labor union or its representatives, 29 U.S.C. 186(a)(2), and for a labor union to "request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value," 29 U.S.C. 186(b)(1).

Section 302 was enacted because of congressional "concern[] with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control." *Arroyo* v. *United States*, 359 U.S. 419, 425-426 (1959) (footnotes omitted); see, *e.g.*, *Caterpillar, Inc.* v. *International Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 107 F.3d 1052, 1057 (3d Cir.) (en banc), cert. granted, 521 U.S. 1152 (1997), and cert. dismissed, 523 U.S. 1015 (1998); *Turner* v. *Local Union No. 302, Int'l Bhd. of Teamsters*, 604 F.2d 1219, 1227 (9th Cir. 1979); *United States* v. *Roth*, 333 F.2d 450, 453 (2d Cir. 1964), cert. denied, 380 U.S. 942 (1965).

2. Only three circuits have considered whether an employer's compliance with a voluntary recognition agreement is a "payment, loan, or delivery" of a "thing of value" in violation of Section 302. All three of those courts recognized that employers and unions may voluntarily agree to set ground rules for union organizing campaigns without violating Section 302. The Eleventh Circuit stated, however, that some employer-union agreements could violate Section 302, depending on the parties' intent.

In *Hotel Employees & Restaurant Employees Union, Local 57* v. *Sage Hospitality Resources, LLC*, 390 F.3d

206 (3d Cir. 2004), cert. denied, 544 U.S. 1010 (2005), an employer agreed to recognize a union based on a card-check procedure and the union made a no-picketing promise in return. *Id.* at 209. The court of appeals concluded that compliance with the ground-rules agreement was not payment or delivery of a prohibited "thing of value" under Section 302. *Id.* at 218-219. The court explained that Section 302 was designed to combat "corruption of collective bargaining through bribery," and it would not make sense to read it to criminalize a "valid labor agreement." *Ibid.* (citation omitted). The court also noted that "[i]ssues of labor-unit recognition and bargaining are comprehensively regulated by the NLRA," and reading Section 302 to cover voluntary recognition agreements would upset the "carefully balanced structure of the laws governing recognition of and bargaining with unions." *Id.* at 219.

The Fourth Circuit took a similar approach in *Adcock* v. *Freightliner LLC*, 550 F.3d 369 (2008), cert. denied, 558 U.S. 932 (2009). In that case, the employer agreed to recognize the union based on a card-check procedure, to require employees to attend a presentation about the card-check procedure, to allow the union access to its facilities, and to remain neutral on the question of unionization. *Id.* at 371. The court of appeals held that "an agreement setting forth ground rules to keep an organizing campaign peaceful does not involve the delivery of a 'thing of value' to a union" in violation of Section 302. *Id.* at 376. The court noted that Section 302 is "aimed at preventing bribery, extortion, and other corrupt practices," and explained that the concessions at issue were not "a means of bribing representatives of the Union" but instead "serve the interests of both Freightliner and the Union, as they eliminate the potential for hostile

organizing campaigns in the workplace." *Id.* at 375 (citation and internal quotation marks omitted). The court also concluded that an item must "have at least some ascertainable value" to qualify as a "thing of value" under Section 302, and it found that the concession at issue did not have an ascertainable value. *Ibid.* Finally, the court observed that the proper mechanism for challenging organizational assistance agreements was using the remedies available under the NLRA, and it noted that unfair labor practice charges had been filed with the NLRB in that particular case. *Id.* at 376-377.

In the decision below, the court of appeals agreed with the Third and Fourth Circuits that "[e]mployers and unions may set ground rules for an organizing campaign, even if the employer and union benefit from the agreement." Pet. App. 5-6, 8. The court stated that although "organizing assistance can be a thing of value," "an employer does not risk criminal sanctions simply because benefits extended to a labor union can be considered valuable." *Id.* at 7. But the court decided that it would be "too broad" to hold "that all neutrality and cooperation agreements are exempt" from Section 302. *Id.* at 8. In the court's view, "innocuous ground rules can become illegal payments if used as valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer." *Ibid.* The court therefore remanded for the district court to consider "the reason why" Unite Here and Mardi Gras decided to enter into the agreement. *Id.* at 9.

3. Although the Eleventh Circuit seemingly diverged from the approaches of the Third and Fourth Circuits, the degree and impact of the different approaches is unclear. All three courts recognized that agreements setting ground rules for union organizing campaigns are

permissible as a matter of federal labor law and generally should not subject an employer to criminal liability under Section 302. Pet. App. 7; *Adcock*, 550 F.3d at 376; *Sage*, 390 F.3d at 218-219. But unlike the Third and Fourth Circuits, the court below envisioned situations in which an employer's compliance with the terms in a voluntary employer-union agreement could violate Section 302. Pet. App. 8-9. In the court's view, whether such an agreement violates Section 302 depends on the legitimacy of the parties' intent. *Ibid.*

An approach that makes the validity of an organizing ground-rules agreement under Section 302 depend on the parties' intent is unsound. Section 302(a)(2) and (b)(1) are prophylactic bans on certain practices that do not require a specific intent to corrupt a union or to extort a benefit from an employer. See 29 U.S.C. 186(a)(2) and (b)(1). By contrast, intent to exert improper influence is required under a different part of the statute. See 29 U.S.C. 186(a)(4) (making it unlawful for an employer to pay any money or any other thing of value to an officer of a labor organization "with intent to influence him in respect to any of his actions, decisions, or duties" as an officer of the labor organization). When Congress wants to make the legality of giving a thing of value contingent on an intent to influence the recipient, it knows how to do so, and Congress did not do so here. Indeed, Congress provided a different remedial scheme for addressing an employer-union agreement that may have an unlawful purpose or effect: an enforcement proceeding before the NLRB. See, *e.g.*, *Adcock*, 550 F.3d at 376-377. Allowing Section 302 to police standard card-check, access, and neutrality agreements based on an inquiry into an improper intent would infringe on the role of the NLRB.

Review is not warranted at this time, however, because substantial uncertainty surrounds the scope and effect of the court of appeals' decision. The court's decision does not clarify what circumstances would violate Section 302. The court stated that an employer could violate Section 302 if it "offer[ed] organizing assistance with the intention of improperly influencing a union." Pet. App. 8. But the court did not explain what type of influence would be "improper[]," except to suggest that "a scheme to corrupt a union or to extort a benefit from an employer" would qualify. *Ibid.* Nor did the court indicate whether the intent inquiry was subjective or objective. The court then remanded the case so the district court could create a factual record for further consideration of whether Section 302 was violated here. As a result, the opinion provides scant guidance on the applicable legal standard. And it is not known at this time whether the decision's potential to hinder labor relations and intrude on the NLRB's role will in fact be realized.

Given these uncertainties, the Court should permit the question of how Section 302 applies to voluntary recognition agreements to percolate in the circuits. At this point, only three circuits have weighed in, and the decision below may be clarified as a result of the court's remand, which would bring into focus any differences in the courts' approaches. It also would be beneficial to allow the courts to consider the application of Section 302 to different types of promises in voluntary recognition agreements. The court below noted, for example, that "[n]o other circuit ha[d] published an opinion involving the precise facts presented on this appeal." Pet. App. 6. Consideration of agreements that contain different terms could illuminate whether any type of

agreement would as a general matter implicate the policy concerns underlying Section 302. Moreover, allowing the issue to percolate may permit a sounder assessment of the impact of the court of appeals' decision on labor-management relations. That process is particularly appropriate before this Court is called upon to establish a nationwide rule.

Review is particularly unwarranted here because the decision is interlocutory. The court of appeals ultimately may conclude that this case does not involve any type of "improper payment" (Pet. App. 9) that could violate Section 302, or the court may find such a violation and explain what makes the employer's actions improper. In either event, it would be beneficial to wait for a final judgment. This Court routinely denies petitions by parties challenging interlocutory determinations that may be reviewed at the conclusion of the proceedings, see, *e.g.*, *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916), and that course is advisable here. Whether final judgment is reached through summary judgment or trial, the additional factual development will crystallize the parties' claims, and the parties will be able to raise those claims—together with any other claims that may arise—in a single petition for a writ of certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam).

4. Finally, this case would be a poor vehicle to review the question presented because this case may well be moot. Mulhall sued to enjoin the operation of the Mardi Gras-Unite Here agreement and to obtain a declaratory judgment that compliance with the agreement would violate Section 302. See Pet. App. 64 ("Plaintiff seeks an injunction under § 302(e) that prohibits Local 355 from demanding or receiving from his employer 'things of

value' in the form of organizing assistance and a declaration that Local 355's demands violate § 302(b)(1) of the LMRA."); see also *id.* at 75 (prayer for relief). At this point, it seems clear that the only way that Mardi Gras would provide the promised access to its property and employees and neutrality during an organizing campaign is if it were ordered to do so to comply with the agreement. Mardi Gras decided in 2008 that it no longer intended to comply with the agreement, and it now takes the view that it would be illegal to do so under Section 302. See *id.* at 14-15; pp. 4-5, *supra*.

But the agreement is no longer in force. By its terms, the agreement was to remain in effect for no more than four years after Mardi Gras installed slot machines at its Florida casino. Pet. App. 85. The slot machines were installed in 2006, thereby triggering the agreement. *Id.* at 14, 38. That means the agreement should have expired at the end of 2010 at the latest. But an arbitrator extended the agreement for one year as a remedy for Mardi Gras's failure to abide by the agreement, and the federal court upheld that extension. See p. 5, *supra*. That means the agreement would have expired by the end of 2011. The parties dispute the date the agreement expired—Mardi Gras says the date is October 24, 2011, and Unite Here says the date is December 31, 2011, see 12-99 & 12-312 Br. in Opp. 3—but either way, the agreement has expired. Because the remedy Mulhall seeks is to prevent enforcement of the agreement, it appears that his claims may well be moot. See, *e.g.*, *Campbell* v. *PMI Food Equip. Grp., Inc.*, 509 F.3d 776, 781-782 (6th Cir. 2007) (case seeking a declaration that a tax-abatement agreement was unconstitutional was moot because the agreement was "no longer in effect and no party has any continuing obligations

under it"); *Agrigenetics, Inc.* v. *Rose*, 62 F.3d 268, 270-271 (8th Cir. 1995) (former employer's suit for a preliminary injunction to compel a former employee to comply with a non-competition restriction in an employment agreement was moot because the non-competition restriction had expired).

Unite Here and Mulhall make various arguments why this case is not moot. Unite Here notes that an arbitration proceeding is pending, and it suggests that the arbitrator could order extension of the agreement as a remedy for Mardi Gras' breach of the agreement. See Unite Here Cert. Reply Br. 6. It also suggests that Mulhall's complaint seeks to enjoin the union from ever participating in another such neutrality agreement. *Id.* at 7. Mulhall, for his part, suggests that the agreement's terms could be extended, and he also contends that the union would continue to request the access to employer property, employee lists, and neutrality in the absence of an agreement. 12-99 Mulhall Cert. Reply Br. 18. The possibility that an arbitrator in a different proceeding may extend the terms of the agreement seems quite speculative, and this Court has found a case moot under similar circumstances. See *Local No. 8-6, Oil, Chem. & Atomic Workers Int'l Union* v. *Missouri*, 361 U.S. 363, 367-368 (1960) (injunction against a strike expired by its terms and the pendency of collateral litigation did not save case from mootness); cf. *United States* v. *Juvenile Male*, 131 S. Ct. 2860, 2864 (2011) (per curiam) (a "possible, indirect benefit in a future lawsuit cannot save *this* case from mootness" as a result of expiration of a challenged registration condition). Moreover, the complaint by its terms appears to seek relief limited to the particular agreement that expired sometime in 2011. But regardless of how the Court might ultimately

resolve the mootness question, the point for present purposes is that the question is sufficiently substantial to counsel against granting review in this case. For that reason as well, further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari in No. 12-99 and the conditional cross-petition for a writ of certiorari in No. 12-312 should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
MYTHILI RAMAN
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
NICOLE A. SAHARSKY
Assistant to the Solicitor General
JOHN M. PELLETTIERI
Attorney

MAY 2013

JOINT APPENDIX

RECORD
AND
BRIEFS

No. 12-99

In The Supreme Court of the United States

UNITE HERE LOCAL 355,

Petitioner,

vs.

MARTIN MULHALL; HOLLYWOOD GREYHOUND TRACK, INC. d/b/a MARDI GRAS GAMING,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

RICHARD G. MCCRACKEN*
ANDREW J. KAHN
PAUL L. MORE
DAVIS, COWELL & BOWE LLP
595 Market Street, Suite 1400
San Francisco, CA 94105
Telephone: (415) 597-7200
rmccracken@dcbsf.com

Counsel for Petitioner

WILLIAM L. MESSENGER*
NATIONAL RIGHT TO WORK FOUNDATION
8001 Braddock Road, Suite 600
Springfield, VA 22160
Telephone: (703) 321-8510
wlm@nrtw.org

Counsel for Respondent Martin Mulhall

MARK E. LEVITT*
ALLEN, NORTON & BLUE, P.A.
1477 W. Fairbanks Avenue, Suite 100
Winter Park, FL 32789
Telephone: (407) 571-2152
mlevitt@anblaw.com

Counsel for Respondent Hollywood Greyhound Track, Inc. d/b/a Mardi Gras Gaming

Counsel of Record

Petition For Certiorari Filed July 20, 2012
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CIVIL DOCKET FOR CASE #: 0:08-cv-61766-RSR

Date Filed	#	Docket Text
11/03/2008	1	COMPLAINT against Unite Here Local 355, Hollywood Greyhound Track, Inc. Filing fee $ 350.00. Receipt#: 544567, filed by Martin Mulhall.(vt) (Entered: 11/04/2008)
11/03/2008	2	Summons Issued as to Unite Here Local 355, Hollywood Greyhound Track, Inc.. (vt) (Entered: 11/04/2008)
11/03/2008	3	MOTION for Limited Appearance, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filings for William L. Messenger, Filing Fee $75.00, Receipt #544568. (Attachments: # 1 Text of Proposed Order)(cw) (Entered: 11/04/2008)
11/05/2008	4	PAPERLESS ORDER granting 3 Motion for Limited Appearance, Consent to Designation and Request to Electronically Receive Notices of Electronic Filings by William L. Messenger, Esq. Signed by Judge William J. Zloch on 11/5/2008. (bc) (Entered: 11/05/2008)

11/07/2008	5	ANSWER to Complaint by Hollywood Greyhound Track, Inc..(Rosenfeldt, Stuart) (Entered: 11/07/2008)
11/21/2008	6	Notice of Pendency of Other Action by Unite Here Local 355 (Warman, Noah) (Entered: 11/21/2008)
11/21/2008	7	MOTION to Dismiss 1 Complaint by Unite Here Local 355. Responses due by 12/11/2008 (Warman, Noah) (Entered: 11/21/2008)
11/21/2008	8	MEMORANDUM OF LAW *in Support of Motion to Dismiss or Stay* by Unite Here Local 355. (Warman, Noah) (Entered: 11/21/2008)
11/21/2008	9	alternative MOTION to Stay by Unite Here Local 355. **See 7 for Image** Responses due by 12/11/2008 (gp) (Entered: 11/24/2008)
11/21/2008	11	MEMORANDUM in Support re 9 MOTION to Stay, 7 MOTION to Dismiss 1 Complaint filed by Unite Here Local 355. **See 8 for Image** (gp) (Entered: 11/24/2008)
12/11/2008	13	RESPONSE in Opposition re 7 MOTION to Dismiss 1 Complaint filed by Martin Mulhall. (Levine, Daniel) (Entered: 12/11/2008)
12/11/2008	14	RESPONSE in Opposition re 9 MOTION to Stay filed by Martin Mulhall. (Levine, Daniel) (Entered: 12/11/2008)

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12/19/2008 20 REPLY to Response to Motion re 7 MOTION to Dismiss 1 Complaint filed by Unite Here Local 355. (Warman, Noah) (Entered: 12/19/2008)

01/05/2009	21	Notice of Supplemental Authority re 7 MOTION to Dismiss 1 Complaint by Unite Here Local 355 (Attachments: # 1 Exhibit A)(Warman, Noah) (Entered: 01/05/2009)
02/18/2009	26	ORDER OF TRANSFER. Case re-assigned to Judge Patricia A. Seitz for all further proceedings. Judge William J. Zloch no longer assigned to case. Signed by Judge William J. Zloch on 1/30/2009. (ail) (Entered: 02/19/2009)
02/27/2009	27	ORDER (1)denying 22 MOTION to Permit Filing of Paper Pleadings AND (2)Setting Hearing. Signed by Judge Jose E. Martinez on 2/27/2009. (ail) (Entered: 03/02/2009)
03/02/2009		Motion Hearing set for 4/13/2009 08:30 AM in Miami Division before Judge Patricia A. Seitz. SEE ORDER DE 27 (ail) (Entered: 03/02/2009)
04/10/2009	28	Notice of Supplemental Authority re 13 Response in Opposition to Motion by Martin Mulhall (Attachments: # 1 Exhibit A – Parties' Joint Scheduling Report)(Levine, Daniel) (Entered: 04/10/2009)
04/13/2009	29	Minute Entry for proceedings held before Judge Patricia A. Seitz: Motion Hearing held on 4/13/2009 re 7 MOTION to Dismiss 1 Complaint filed by Unite Here Local 355. Court Reporter: David Ehrlich, Phone: 305-523-5537 (lw) (Entered: 04/15/2009)

04/22/2009	30	ORDER granting 7 Motion to Dismiss; denying as moot 9 Motion to Stay. Signed by Judge Patricia A. Seitz on 4/22/2009. (ail) (Entered: 04/22/2009)
05/15/2009	31	PLAINTIFF'S NOTICE OF APPEAL by Martin Mulhall re 30 Order on Motion to Dismiss, Order on Motion to Stay; Filing fee $ 455.00, receipt number 1001004. Within ten days of the filing date of a Notice of Appeal, the appellant must complete the Eleventh Circuit Transcript Order Form regardless of whether transcripts are being ordered [Pursuant to FRAP 10(b)]. For information go to our FLSD website under Transcript Information. (nc) (Entered: 05/18/2009)
05/18/2009		Transmission of Notice of Appeal, Docket Sheet and Order under appeal sent to US Court of Appeals re 31 Notice of Appeal, as to Martin Mulhall (nc) (Entered: 05/18/2009)
12/22/2009	35	Certified and Transmitted Record on Appeal to US Court of Appeals (Atlanta Office) Consisting of (1)Volume of Pleadings re 31 Notice of Appeal, (nc) (Entered: 12/22/2009)
10/15/2010	37	MANDATE of USCA (certified copy) REVERSE the district court's order and judgment of dismissal and REMAND the case for further proceedings consistent with this opinion re 31 Notice of Appeal, filed

by Martin Mulhall ; Date Issued: 10/12/2010 ; USCA Case Number: 09-12683-DD (amb) (Entered: 10/18/2010)

11/16/2010 40 Renewed MOTION to Dismiss 1 Complaint by Unite Here Local 355. Responses due by 12/3/2010 (Warman, Noah) (Entered: 11/16/2010)

11/16/2010 41 MOTION *to take judicial notice of related case* by Unite Here Local 355. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4)(Warman, Noah) (Entered: 11/16/2010)

12/17/2010 44 RESPONSE in Opposition re 40 Renewed MOTION to Dismiss 1 Complaint filed by Martin Mulhall. (Levine, Daniel) (Entered: 12/17/2010)

12/23/2010 45 REPLY to Response to Motion re 40 Renewed MOTION to Dismiss 1 Complaint filed by Unite Here Local 355. (Warman, Noah) (Entered: 12/23/2010)

01/24/2011 49 ORDER granting 40 Motion to Dismiss. Complaint is Dismissed with Prejudice. Case is Closed. Signed by Judge Patricia A. Seitz on 1/24/11. (mg) (Entered: 01/24/2011)

02/02/2011 50 NOTICE OF APPEAL as to 49 Order on Motion to Dismiss by Martin Mulhall Filing fee $ 455.00. Within fourteen days of the filing date of a Notice of Appeal, the appellant must complete the Eleventh Circuit

Transcript Order Form regardless of whether transcripts are being ordered [Pursuant to FRAP 10(b)]. For information go to our FLSD website under Transcript Information. (Levine, Daniel) (Entered: 02/02/2011)

02/03/2011 Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 50 Notice of Appeal, Filing Fee: (FEE NOT PAID) (hh) (Entered: 02/03/2011)

02/16/2011 52 Acknowledgment of Receipt re 50 Notice of Appeal, filed by Martin Mulhall. Date received by USCA: 2/9/11. USCA Case Number: 11-10594-F. (hh) (Entered: 02/16/2011)

06/07/2011 54 Certified and Transmitted Record on Appeal to US Court of Appeals Consisting of (2) Volumes of Pleadings re 50 Notice of Appeal, (hh) (Entered: 06/07/2011)

06/21/2011 55 Acknowledgment of Receipt of COR/ROA from USCA re 50 Notice of Appeal, filed by Martin Mulhall. Date received by USCA: 06/13/2011. USCA Case Number: 11-10594-FF. (amb) (Entered: 06/22/2011)

05/09/2012 56 MANDATE of USCA (certified copy) REVERSED AND REMANDED. We find that Mulhall has stated a claim for relief, and we remand so that the district court can consider the 302 claim and determine the reason why

Unite amd Mardi Gras agreed to cooperate with one another as to 50 Notice of Appeal, filed by Martin Mulhall ; Date Issued: 5/9/12 ; USCA Case Number: 11-10594-FF (hh) (Entered: 05/09/2012)

07/31/2012 64 ORDER REASSIGNING CASE to Judge Robin S. Rosenbaum for all further proceedings, Judge Patricia A. Seitz no longer assigned to case Signed by Judge Patricia A. Seitz on 7/31/2012. (mb) (Entered: 07/31/2012)

08/02/2012 65 Unopposed MOTION to Stay by Unite Here Local 355. Responses due by 8/20/2012 (Attachments: # 1 Text of Proposed Order)(Warman, Noah) (Entered: 08/02/2012)

08/02/2012 66 ORDER granting in part 65 Defendant Unite Here Local 355's Unopposed Motion to Stay. This case will be stayed for a six-month period. The parties shall file status reports updating the Court on the petition for writ of certiorari every 45 days. Please see Order for details. Signed by Judge Robin S. Rosenbaum on 8/2/2012. (kms) (Entered: 08/02/2012)

09/14/2012 72 NOTICE by Unite Here Local 355 re 66 Order on Motion to Stay, *Status Report of Appeal to Supreme Court* (Warman, Noah) (Entered: 09/14/2012)

09/14/2012 73 STATUS REPORT by Unite Here Local 355 (ls)(See Image at DE # 72) (Entered: 09/17/2012)

10/29/2012 75 STATUS REPORT by Unite Here Local 355 (Warman, Noah) Modified on 10/30/2012 (ls). (Entered: 10/29/2012)

12/12/2012 76 STATUS REPORT *on Status of Appeal to Supreme Court* by Unite Here Local 355 (Attachments: # 1 Exhibit Docket from U.S. Supreme Court)(Warman, Noah) (Entered: 12/12/2012)

01/29/2013 78 NOTICE by Unite Here Local 355 re 66 Order on Motion to Stay, *on Status of Appeal to Supreme Court* (Attachments: # 1 Exhibit Supreme Court Docket)(Warman, Noah) (Entered: 01/29/2013)

01/29/2013 79 STATUS REPORT by Unite Here Local 355 (ls)(See Image at DE # 78) (Entered: 01/30/2013)

03/22/2013 82 Joint MOTION to Stay by Martin Mulhall, Unite Here Local 355. Responses due by 4/8/2013 (Attachments: # 1 Text of Proposed Order)(Levine, Daniel) (Entered: 03/22/2013)

03/26/2013 83 ORDER granting 82 Joint Motion to Stay and Directing Clerk to Administratively Close this Case. Signed by Judge Robin S. Rosenbaum on 3/26/2013. (ls) (Entered: 03/26/2013)

RELEVANT DOCKET ENTRIES FOR THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CIVIL DOCKET FOR CASE #: 11-10594

Date Filed	#	Docket Text
02/09/2011	1	CIVIL APPEAL DOCKETED. Notice of appeal filed by Appellant Martin Mulhall on 02/02/2011. Fee Status: Fee Not Paid
02/28/2011	8	Modified Civil Appeal Statement received by Attorney William L. Messenger for Appellant Martin Mulhall.
03/21/2011	10	E-Brief Tendered: Appellant brief for Appellant Martin Mulhall.
03/23/2011	11	Appellant's brief filed by Martin Mulhall. Service date: 03/21/2011 [11-10594] Attorney for Appellee: Warman – US mail.
03/23/2011	12	Record Excerpts filed by Appellant Martin Mulhall. Service date: 03/21/2011 US mail- Attorney for Appellee: Warman.
03/28/2011	14	Amicus Brief filed by Amicus Curiae National Federation of Independent Business Small Business Legal Centers. Service date: 04/28/2011 US mail- Attorney for Amicus Curiae: Richard L. Brittain.

04/27/2011	17	Amicus Curiae National Federation of Independent Business Small Business Legal Centers added to case.
04/29/2011	18	E-Brief Tendered: Amicus brief for Amicus Curiae National Federation of Independent Business Small Business Legal Centers.
06/01/2011	20	Appellee's Brief filed by Appellee Unite Here Local 355. Service date: 05/31/2011 US mail- Attorney for Appellant: Messenger.
06/01/2011	21	E-Brief Tendered: Appellee brief for Appellee Unite Here Local 355.
06/08/2011	22	Amicus Brief filed by Amicus Curiae Service Employees International Union. Service date: 06/08/2011 US mail -Attorney for Amicus Curiae: Leonard.
06/14/2011	27	Amicus Curiae Service Employees International Union added to case.
06/16/2011	28	E-Brief Tendered: Reply brief for Appellant Martin Mulhall.
06/20/2011	29	Reply Brief filed by Appellant Martin Mulhall. Service 06/16/2011 US mail-Attorney for Appellee: Warman.
07/11/2011	31	E-Brief Tendered: Amicus brief for Amicus Curiae Service Employees International Union.
10/13/2011	33	MOTION to participate in oral argument. filed by Amicus Curiae Service Employees International Union.

Opposition to Motion is Unknown [6404720-1]

10/21/2011 34 ORDER: Motion to appear in oral argument filed by Amicus Curiae Service Employees International Union is GRANTED. [6404720-2] CRW, PTF and JAR

12/09/2011 35 Oral argument held. Oral Argument participants were Danielle E. Leonard for Amicus Curiae Service Employees International Union and Not Party Service Employees International Union, William L. Messenger for Appellant Martin Mulhall and Noah Scott Warman for Appellee Unite Here Local 355.

01/18/2012 36 Opinion issued by court as to Appellant Martin Mulhall. Decision: Reversed and Remanded. Opinion type: Published. Opinion method: Signed.

01/18/2012 37 Judgment entered as to Appellant Martin Mulhall.

02/08/2012 39 Petition for rehearing en banc filed by Appellee Unite Here Local 355. (ECF: Noah Warman)

02/09/2012 40 Petition for rehearing en banc filed by Appellees Hollywood Greyhound Track, Inc. and Unite Here Local355.

02/21/2012 43 *MOTION to file amicus brief pursuant to FRAP 29(a) filed by Danielle Leonard AFL-CIO; Change to Win; Communications Workers of America;*

International Brotherhood of Teamsters; Service Employees International Union; United Automobile Workers; United Food & Commercial Workers International Union; United Steelworkers. [6496866-1] (ECF: Danielle Leonard)

02/21/2012 44 *MOTION to file amicus brief filed by Amicus Curiae Service Employees International Union, et al. Opposition to Motion is Unknown [6497686-1]*

02/22/2012 45 RESPONSE to Motion for leave to file amicus brief filed by Amicus Curiae Service Employees International Union in 11-10594, Motion for leave to file amicus brief filed by Attorney William L. Messenger for Appellant Martin Mulhall. (ECF: William Messenger)

02/29/2012 47 ORDER: Motion for leave to file amicus brief filed by Amicus Curiae Employees International Union is GRANTED. [6496866-21 CRW-[Edited 03/06/2012 by JKS]

02/29/2012 49 Amicus Brief filed by Amicus Curiae Service Employees International Union. et al. Service date: 02/20/2012 US mail- Attorney for Amicus Curium: Brittain, Watson; Attorney for Appellant: Levine; Attorney for Appellees: Rosenfeldt, Strohsahl; email- Attorney for Amicus Curiae: Leonard; Attorney

		for Appellant: Messenger; Attorney for Appellee: Warman.
04/12/2012	54	Amicus brief in support of rehearing petition filed by Amicus Curiae USA. Service date: 04/12/2012 email Attorney for Amicus Curium: Brittain, Leonard, Pellettieri, Watson (ECF: John Pellettieri)
04/13/2012	55	Received paper copies of EBrief filed by Amicus Curiae USA.
04/25/2012	56	ORDER: The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled, the Petition(s) for Rehearing En Banc filed by Appellee Unite Here Local 355 are DENIED. [6550511-1]
05/09/2012	57	Mandate issued as to Appellant Martin Mulhall.
07/24/2012	59	Notice of Writ of Certiorari filed as to Appellee Unite Here Local 355. SC# 12-99.
09/10/2012	60	Checked status of ceritorari [sic] Sep 5 2012 DISTRIBUTED for Conference of September 24, 2012. filed as to Amicus Curiae National Federation of Independent Business Small Business Legal Centers – Pending.
09/13/2012	61	Notice of Writ of Certiorari filed as to Appellant Martin Mulhall. SC# 12-312.-[Edited 10/05/2012 by VLK]

06/24/2013 62 Writ of Certiorari filed as to Appellant Martin Mulhall is GRANTED. SC# 12-99.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-CV-61766-ZLOCH/SNOW

MARTIN MULHALL,

Plaintiff,

vs.

UNITE HERE LOCAL 355, HOLLYWOOD GREYHOUND TRACK, INC. d/b/a MARDI GRAS GAMING,

Defendants.
_____/

DEFENDANT, HOLLYWOOD GREYHOUND TRACK, INC. d/b/a MARDI GRAS GAMING'S ANSWER TO PLAINTIFF'S COMPLAINT

(Filed Nov. 7, 2008)

COMES NOW the Defendant, HOLLYWOOD GREYHOUND TRACK, INC. d/b/a MARDI GRAS GAMING ("MARDI GRAS") by and through undersigned counsel and hereby serves its Answer to Plaintiff's Complaint as follows:

1. MARDI GRAS admits all allegations contained in paragraphs 1 through 38 of Plaintiff's complaint.

Respectfully submitted,

ROTHSTEIN ROSENFELDT ADLER
Counsel for Defendant
MARDI GRAS
401 E. Las Olas Boulevard, Suite 1650
Fort Lauderdale, Florida 33301
Tel: 954-522-3456/Fax: 954-527-8663

By: /s/ Stuart A. Rosenfeldt
Stuart A. Rosenfeldt, Esq.
FBN: 316113
FOR THE FIRM

[Certificate Of Service And
Service List Omitted In Printing]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 08-CV-61766-ZLOCH/SNOW

MARTIN MULHALL,

Plaintiff,

v.

UNITE HERE LOCAL 355 and HOLLYWOOD GREYHOUND TRACK, INC. d/b/a MARDI GRAS GAMING,

Defendants. /

NOTICE OF RELATED PENDING LITIGATION

(Filed Nov. 21, 2008)

Defendant UNITE HERE Local 355 hereby notifies the Court of related pending litigation. Presently UNITE HERE Local 355 is the plaintiff in an action against Hollywood Greyhound Track, Inc., d/b/a Mardi Gras Gaming. That action is pending in this district, Ft. Lauderdale division, Case No. Case No. [sic] 08-61655-CIV-Seitz/O'Sullivan. The events and transactions underlying that claim are the same as those at issue in the above-captioned lawsuit.

Respectfully submitted this 21st day of November, 2008.

s/ Noah Scott Warman
Noah Scott Warman
(Florida Bar Number: 30960)
Attorney E-mail Address:
nwaman4sugarmansusskind.com
Sugarman & Susskind, P.A.
100 Miracle Mile, Suite 300
Coral Gables, Florida 33134
Telephone: (305) 529-2801
Facsimile: (305) 447-8115
One of the Attorneys for Defendant
UNITE HERE Local 355

Andrew J. Kahn
Attorney E-mail Address:
ajk@dcbsf.com
Davis Cowell & Bowe
595 Market St. #1400
San Francisco, California 94105
Telephone: (415) 597-7200
Facsimile: (415) 597-7201
Attorneys for Defendant
UNITE HERE Local 355

* * *

[Certificate Of Service And
Service List Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-CV-61766-Seitz/O'Sullivan

MARTIN MULHALL,

Plaintiff,

v.

UNITE HERE LOCAL 355,
HOLLYWOOD GREYHOUND TRACK, INC.,
d/b/a MARDI GRAS GAMING,

Defendants.

PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY

(Filed Apr. 10, 2009)

Plaintiff Martin Mulhall hereby submits the following supplemental authority in support of his Opposition to Defendant UNITE HERE Local 355's Motion to Dismiss: the Joint Scheduling Statement submitted by UNITE in *Unite Here Local 355 v. Hollywood Greyhound Track, Inc., D/b/a Mardi Gras Gaming,* Case No. 08-61655 (S.D. Fla. 23 Feb. 2009) (Ex. A).

Dated: 10 April 2009

Boca Raton, Florida

Respectfully submitted,

/s/ Daniel R. Levine

DANIEL R. LEVINE, ESQ.
Florida Bar No. 0057861
Email:
drlevine@sbwlawfirm.com
SHAPIRO, BLASI,
WASSERMAN, &
GORA, P.A.
7777 Glades Road,
Suite 400
Boca Raton, Florida 33434
Telephone: (561) 477-7800
Facsimile: (561) 477-7722
Co-counsel for Plaintiff

William L. Messenger
Virginia Bar No. 47179
(Pro Hac Vice)
E-mail: wlm@nrtw.org
c/o National Right to
Work Legal Defense
Foundation
8001 Braddock Road,
Suite 600
Springfield, Virginia 22160
Telephone: (703) 321-8510
Facsimile: (703) 321-9319
Co-counsel for Plaintiff

* * *

[Certificate Of Service And
Service List Omitted In Printing]

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FT. LAUDERDALE DIVISION

CASE NO. 08-61655-CIV-SEITZ/O'SULLIVAN

UNITE HERE LOCAL 355,

Plaintiff,

vs.

HOLLYWOOD GREYHOUND TRACK INC. d/b/a MARDI GRAS GAMING,

Defendant. /

PARTIES' JOINT SCHEDULING REPORT

Plaintiff UNITE HERE LOCAL 355 (the "Union") and Defendant Hollywood Greyhound Track Inc. ("Mardi Gras") (collectively the "Parties") in conformance with S.D. Fla. L. R. 16.1 and the Court's January 2009 Order, hereby file this Joint Scheduling Report. The undersigned attorneys conducted their scheduling meeting by telephone on Feb. 17, 2009.

A. Nature of the claim and counterclaims, with a good faith estimate of the dollar valuation of damages claimed and any other relief sought:

Nature of the claims and counterclaims: Plaintiff Union brought this action in September to compel

arbitration under the parties' agreement pursuant to section 301 of the Labor Management Relations Act (LMRA) and the Federal Arbitration Act. The parties' agreement is commonly known as a "card check neutrality agreement", and bars the Union from engaging in any picketing or boycott and requires the Employer remain neutral as to whether employees choose to unionize, allow the Union access to break areas and lists of employees, and recognize the Union as majority representative is an arbitrator's check of authorization cards signed by employees shows that a majority have authorized representation by the Union. Defendant Mardi Gras answered the complaint and counterclaimed asserting that the above-cited Employer promises violate LMRA section 302, which makes it a crime for an employer to deliver a union representative or union any money or thing of value, and is void under §§ 7 and 8 of the NLRA. This case is related to a later-filed case *Martin Mulhall v. UNITE HERE Local 355*, S.D. Fla. No.08-CV-61766-ZLOCH/SNOW, in which an alleged Mardi Gras employee also asserts section 302 claims against this agreement. Plaintiff here moved in September 2008 to compel arbitration and to stay or dismiss the counterclaims. The motion was fully briefed as of 12/7/08, except that Defendant has sought leave to file a supplemental brief addressing a recent Fourth Circuit decision.

Damages and other relief sought: the Union contends that it is for the arbitrator alone to determine damages for breach of contract, but notes

its damages are continuing and to date have been primarily its legal expenses in this action of over $25,000 and lost wages and benefits for Mardi Gras employees of over $200,000 based on the differences between the compensation standards at this property versus unionized properties. If Defendant's illegality claim is upheld, then the Union will request restitutionary damages from the arbitrator or court based on quantum meruit for the time and money the Union and its members spent on the political campaign to obtain a gaming license for Mardi Gras (estimated at over $100,000) and over $100,000 in business which Mardi Gras would have lost from a boycott.

On its counterclaims Mardi Gras does not seek damages but only injunctive and declaratory relief. Defendant contends that any damages claimed by Plaintiff are illusory and speculative.

B. Summary of the facts that are uncontested or which can be stipulated to:

Plaintiff is a labor organization and Defendant is an employer engaged in interstate commerce which are parties to an agreement attached to the Complaint which includes arbitration provisions. The Parties agree to make a good-faith effort to negotiate and draft a pretrial stipulation to set forth other agreed issues.

C. A list of the legal elements of each claim and defense asserted:

Plaintiff: That it is a labor organization within the meaning of the LMRA; that Defendant is an employer engaged in interstate commerce; that the two are parties to an agreement attached to the Complaint which includes arbitration provisions; that the parties' dispute over the legality of the agreement's provisions is governed by the arbitration provisions; that if illegality is not for the arbitrator, then Defendant's illegality claim is both incorrect on its merits and/or barred by the statute of limitations, laches. estoppel and/or unclean hands.

Defendant: That the issue of illegality under section 302 is not arbitrable; that a promise of neutrality to a particular union, access to an employer's premises for union-related activities and the dissemination of employee lists to a union – items which are included in the agreement at issue – all constitute "things of value" which an employer is prohibited from delivering under section 302 of the LMRA; that the agreement at issue is void because it was entered into prior to the Plaintiff obtaining majority status in violation of section 8 of the NLRA, 29 U.S.C. § 158 and due to the fact this it restricts the dissemination of Defendant's views regarding unionism in violation of section 7 of the NLRA, 29 U.S.C. § 157; and that Defendant's illegality claim was timely and properly filed.

D. Whether discovery should be conducted in phases or limited to certain issues:

Plaintiff Union believes discovery should be stayed pending the outcome of its pending motion to compel arbitration, and will be bringing a motion to stay discovery "as is the general practice of district courts . . . while the motion to compel arbitration was pending". *Stiener v. Apple Computer, Inc.*, 2007 WL 4219388 (N.D.Cal. 2007).

Defendant does not oppose staying discovery pending a decision on Plaintiffs motion to compel arbitration.

E. A detailed schedule of discovery for each party:

If discovery is not stayed, Plaintiff will propound interrogatories and requests for production and depose Defendant's officials involved in the negotiation of the agreement and the issues covered by the agreement within 30 days of receiving responses to interrogatories and RFPs, assuming the availability of these witnesses.

Defendant will propound interrogatories and requests for production and depose Plaintiff's officials involved in the negotiation and drafting of the agreement within 30 days of receiving responses to its interrogatories and requests for production, assuming the availability of these witnesses.

F. Proposed dates and/or deadlines:

Deadline to join other parties: May 30. 2009 (Plaintiff believes the Court should consolidate this action with the pending *Mulhall* action rather than requiring Plaintiff to burden Mr. Mulhall and all other parties by cross-claiming against him in this action so as to ensure consistency of judicial decisions in this dispute). Defendant contends such consolidation is inappropriate because Mulhall has not executed any agreement that arguably could compel arbitration of this dispute.

Deadline to amend pleadings: May 30, 2009 or if later, 15 days after the court rules on the motion to compel arbitration (if such motion is denied the Union intends to seek leave to amend the complaint to add claims for quantum meruit and fraud to recover the benefits of the bargain which Defendant obtained as a result of the agreement). If this Court grants Plaintiff's Motion to Dismiss Defendant's Counterclaim, Defendant intends to seek leave to file an Amended Counterclaim.

Deadline to file Summary Judgment Motions: August 15, 2009 or if motion to compel arbitration is still pending as of July 15, 2009, then 30 days after any denial of motion to compel arbitration;

Deadline to exchange Fed. R. Civ. P. 26(a)(3) disclosures: August 15, 2009 or if discovery stayed pending ruling on pending motion to compel arbitration, then 50 days after any denial of such motion;

Deadline to complete fact discovery: Sept. 30, 2009 or if discovery stayed pending ruling on the pending motion to compel arbitration, 90 days after denial of such motion;

Pretrial Conference: December 15, 2009 or if later, 15 weeks after summary judgment deadline;

Trial: January 14, 2009 or if later, 30 days after pretrial conference.

G. Estimated length of trial and whether it is jury or non-jury:

The Parties preliminarily estimate that trial would last two (2) to three (3) days. Neither party requests jury trial.

H. A list of all pending motions, whether each is 'ripe" [sic] for review, the date each became ripe and a summary of the parties' respective positions with respect to each ripe motion:

Plaintiff's motion to compel arbitration and to dismiss or stay the counterclaims became ripe on 12/7/08. Plaintiff's position is that illegality of these provisions is initially an issue for the arbitrator, but assuming arguendo the illegality claim is considered by the court, the five other court decisions rejecting similar section 302 claims should be followed. Alternatively, Plaintiff seeks at minimum a stay of the counterclaim pending arbitration out of a belief the

Arbitrator may be able to narrow the issues (if any) left for the Court and provide a factual record to assist the Court.

Defendant's position is that the illegality issue is for the Court to decide, as the language in the agreement at issue does not provide the clear and unmistakable intent of the parties to submit the issue of abitrability [sic] to an arbitrator, and the scope of the arbitration clause in the agreement does not encompass the legality or enforceability of the agreement. Defendant asserts that the agreement is illegal, as the items included in the agreement at issues are clearly covered and prohibited by the plain and unambiguous language of section 302. Defendant further contends that the decisions cited by Plaintiff regarding section 302 are distinguishable from the case at bar and were decided incorrectly. Should this Court find that arbitration of Plaintiff and Defendant's claims is proper, Defendant contends that arbitration should be stayed pending the resolution of *Martin Mulhall v. UNITE HERE Local 355,* S.D. Fla. No.08-CV-61766-ZLOCH/SNOW, as Mr. Mulhall is not subject to the arbitration clause at issue and should not have his section 302 claim effectively decided through a proceeding that he cannot participate in and before a forum which he never agreed to be the final arbiter of his claim. Defendant has pending an application to file a supplemental brief on the latest of these decisions, which application was opposed by Plaintiff.

I. Any unique legal or factual aspect of the case requiring the Court's special consideration:

Plaintiff believes prompt judicial consideration is required of the discovery stay issue addressed in Section D above.

J. Advisability of Referral to Magistrate Judge:

The parties consent only to magistrate judges resolving discovery and non-dispositive motions.

K. The status and likelihood of settlement:

The parties believe there is no likelihood of settlement.

L. Any other matters that Local Rule 16.1B requires, or that may aid in the fair, expeditious and efficient management and/or disposition of this action:

The parties are not aware of any.

Submitted: Feb. 23, 2009.

SUGARMAN & SUSSKIND, P.A.
Attorneys for Plaintiff Local 355
100 Miracle Mile, Suite 300
Coral Gables, FL 33134
Tel: (305) 529-2801
Fax: (305) 447-5118
Email: NWarman@sugarmansusskind.com

/s/ Noah Scott Warman
NOAH SCOTT WARMAN
FBN: 30960

DAVIS COWELL & BOWE
Attorneys for Plaintiff Local 355
595 Market St. #1400
San Francisco, California 94105
Tel: (415) 597-7200
Fax: (415) 597-7201

ANDREW J. KAHN
Email: ajk@dcbsf.com

ROTHSTEIN ROSENFELDT ADLER
Attorneys for Defendant
401 East Las Olas Blvd. Ste. 1650
Fort Lauderdale, FL 33301
Tel: 954-522-3456
Fax: 954-527-8663
Email:
srosenfeldt@rra-law.com
mpancier@rra-law.com
bstrohsahl@rra-law.com

/s/ Brianne M. Strohsahl, Esq.
STUART A. ROSFENFELDT, ESQ.
FBN: 316113
MICHAEL A. PANCIER, ESQ.
FBN: 958484
BRIANNE M. STROHSAHL, ESQ.
FBN: 0028521

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO 08-61655-CIV-SEITZ/O'SULLIVAN

UNITE HERE LOCAL 355,

Plaintiff,

v.

HOLLYWOOD GREYHOUND
TRACK INC.,

Defendant.
_____/

ELECTION TO JURISDICTION BY A UNITED STATES MAGISTRATE JUDGE FOR FINAL DISPOSITION OF MOTIONS

In accordance with the provisions of 28 U.S.C. 636(c), the undersigned parties to the above-captioned civil matter hereby jointly and voluntarily elect to have a United States Magistrate Judge decide the following motions and issue a final order or judgment with respect thereto:

1. Motions for Costs Yes ✓ No ____
2. Motions for Attorney's Fees Yes ✓ No ____
3. Motions for Sanctions Yes ✓ No ____
4. Motions to Dismiss Yes ____ No ✓
5. Motions for Summary Judgment Yes ____ No ✓
6. Other (specify) Other non-dispositive motions

2/17/09	Noah Scott Warren
(Date)	(Signature-Plaintiff's Counsel)
(Date)	(Signature-Plaintiff's Counsel)
2/17/09	Brianne Strohsahl
(Date)	(Signature-Defendant's Counsel)
(Date)	(Signature-Defendant's Counsel)

[Attachment B]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 08-61766-CIV-SEITZ/O'SULLIVAN

MARTIN MULHALL,

Plaintiff,

v.

UNITE HERE LOCAL 355 and HOLLYWOOD GREYHOUND TRACK, INC. d/b/a MARDI GRAS GAMING,

Defendants. /

UNION'S REQUEST FOR JUDICIAL NOTICE

(Filed Nov. 16, 2010)

Defendant UNITE HERE Local 355, pursuant to Rule 201 of the Federal Rules of Evidence, requests that the Court take judicial notice of the file in a related case between the Defendants in this action, *Hollywood Greyhound Race Track Inc. v. UNITE HERE Local 355*, SD Fla. Case No. 09-61760-Zloch. In particular UNITE HERE Local 355 asks the Court to take notice of the following documents, copies of which are attached hereto:

Ex. A: Complaint to Vacate Award (D.E. 1)

Ex. B Arbitration Award (Ex. 1 to Answer, D.E. 4-1).

Ex. C Court Order Enforcing Award (in pertinent part) (D.E. 38)

Ex. D Judgment (D.E. 39)

The relevance of these documents is explained in UNITE HERE Local 355's Motion to Dismiss, which is being filed simultaneously with this request.

Respectfully submitted this 16th day of November, 2010.

s/Noah Scott Warman
Noah Scott Warman
(Florida Bar Number: 30960)
Attorney E-mail Address:
nwarman@sugarmansusskind.com
Sugarman & Susskind, P.A.
100 Miracle Mile, Suite 300
Coral Gables, Florida 33134
Telephone: (305) 529-2801
Facsimile: (305) 447-8115
One of the Attorneys for Defendant
UNITE HERE Local 355

Andrew J. Kahn
Attorney E-mail Address: ajk@dcbsf.com
Davis Cowell & Bowe
595 Market St. #1400
San Francisco, California 94105
Telephone: (415) 597-7200
Facsimile: (415) 597-7201
Attorneys for Defendant
UNITE HERE Local 355

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[Certificate Of Service And Service List Omitted In Printing]

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case No.

HOLLYWOOD GREYHOUND TRACK, INC.,
Applicant,
vs.
UNITE HERE LOCAL 355,
Respondent. /

09-61760-Civ-Zloch/Rosenbaum

MOTION TO PARTIALLY VACATE ARBITRATION AWARD

Applicant, HOLLYWOOD GREYHOUND TRACK, INC., d/b/a Mardi Gras Gaming, ("Mardi Gras"), pursuant to 9 U.S.C. § 10 and Section 302(a)(2) of the Labor Management Relations Act, 29 U.S.C. § 186(a)(2), hereby files this, its Motion to Partially Vacate the Arbitration Opinion and Decision for AAA Case # 32 300 00639 08, and states as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this matter pursuant to Rule 13(a), Fed. R. Civ. P., 28 U.S.C. §§ 1331, 1391(b)-(c), 29 U.S.C. §§ 185 and 186 and 9 U.S.C. § 10.

2. Venue is proper in this federal district pursuant to § 10 of the Federal Arbitration Act, as the arbitration award was made in Broward County, Florida.

PARTIES

3. At all times material hereto, Applicant, Mardi Gras, is a Florida corporation doing business within the Southern District of Florida.

4. At all times material hereto, Applicant, Mardi Gras, was and continues to be an employer within the meaning of 29 U.S.C. § 152(2).

5. At all times material hereto, Respondent, Unite Here Local 355 ("Union"), is a labor organization within the meaning of 29 U.S.C. § 152 representing employees in an industry affecting commerce.

6. At all times material hereto, Respondent is headquartered in Miami, Florida.

PROCEDURAL FACTS

7. On or about August 23, 2004, Mardi Gras and UNITE HERE LOCAL 355 ("the Union") entered into a Memorandum of Agreement ("MOA"), which was to take effect upon the installation of "the first slot machine, Video Lottery Terminal or similar gaming device at [Mardi Gras'] gaming facility"

8. Pursuant to the MOA, Mardi Gras was to provide the Union with the following: (1) Complete

lists of its employees with their job classifications and contact information on a monthly basis; (2) access to its private premises for its employees and union representatives for organizational purposes; and (3) control over Mardi Gras' communications with regard to its views on unionization and the Union itself.

9. At the time Mardi Gras entered into the MOA, it was not aware that the aforementioned items which were demanded by the Union as part of the MOA violated § 302 of the Labor Management Relations Act (the "LMRA") and consequently, the Agreement was illegal. After the MOA became effective around December of 2006, the Union made a handful of demands for employee lists from Mardi Gras.

10. Mardi Gras initially honored the Union's first few requests by furnishing the Union with an updated list. However, Mardi Gras obtained counsel in 2008 and learned that the MOA violated the LMRA based on its obligation on Mardi Gras to provide "things of value" to the Union. Consequently, on or about May of 2008, Mardi Gras refused to indulge the Union's request for an updated employee list, and further refused to provide this information when the Union made a second request on or about July of 2008. The Union demanded arbitration based on Mardi Gras, purported noncompliance with the MOA. When Mardi Gras refused to arbitrate, the Union filed a Petition and Complaint to Compel Labor Arbitration before this Court on or about September 26, 2008.

11. As part of its Petition, the Union sought an Order from this Court directing Mardi Gras to proceed to arbitration as well as injunctive relief against Mardi Gras.

12. Mardi Gras timely responded with an Answer, Affirmative Defenses and a Counterclaim seeking a declaration under 28 U.S.C. §§ 2201 and 2202 that the Neutrality Agreement is illegal, unenforceable and thus *void ab initio,* and further seeking an immediate rescission of the Agreement based on its illegality.

13. The Union subsequently filed a motion to compel arbitration and dismiss Mardi Gras' Counterclaim. After a hearing held on April 13, 2009, this Court entered an Order granting the motion to arbitrate and sending both the Union's claims and Mardi Gras' counterclaim to arbitration.

14. On June 17, 2009, the parties participated in a hearing before Arbitrator Arnold M. Zack in Fort Lauderdale, Florida to decide the following issue: "Whether the Memorandum of Agreement entered into by and between the parties is enforceable?" After the arbitration hearing, the parties submitted their post hearing briefs and disks containing cited authority by July 9, 2009.

15. On August 6, 2009, the Arbitrator entered an Opinion and Decision finding that the Memorandum of Agreement was enforceable and remained in effect until December 31, 2011, "to remedy [Mardi Gras'] breach thereof."

16. The Opinion and Decision (the "Award") denied the Union's request for attorney's fees as well as for an order for Mardi Gras the [sic] issue a "mutually agreeable correction letter to any employee to whom the Employer has directed any anti-union comments."

17. Mardi Gras now moves to vacate the Arbitrator's Award on the basis that it upheld an illegal agreement and as such, is contrary to public policy.

BASIS FOR VACATING AWARD

18. The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq* is applicable to this Motion to Partially Vacate Arbitration Award. A district court may vacate an arbitration award on either statutory or nonstatutory grounds. Under the FAA, an award may be vacated if: (1) The award was procured by corruption, fraud or undue means; (2) there was evident partiality or corruption in the arbitrators; (3) the arbitrators were guilty of misconduct or engaged in any other misbehavior by which the rights of any party have been prejudiced; or (4) the arbitrators exceeded their powers. 9 U.S.C. § 10. An arbitral award may also be vacated on two nonstatutory grounds: (1) if it displays manifest disregard for the law or (2) if it is contrary to public policy.

19. Section 302(a)(2) of the LMRA, codified at 29 U.S.C. § 186(a)(2) states in pertinent part:

> It shall be unlawful for any employer . . . to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value . . .

> to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer.

Additionally, Section 302(b)(1) of the LMRA is a reciprocal prohibition that makes it "unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a)." 29 U.S.C. § 186(b)(1).

20. Pursuant to the Memorandum of Agreement entered into by and between the parties on August 23, 2004, Mardi Gras was to provide the Union with the following: (1) Complete lists of its employees with their job classifications and contact information on a monthly basis; (2) access to its private premises for its employees and union representatives for organizational purposes; and (3) control over Mardi Gras' communications with regard to its views on unionization and the Union itself.

21. Each of the foregoing items in paragraph 20 constitute "things of value" prohibited by Sections 302(a)(2) and 302(b)(1) of the LMRA and do not fall under any of the nine specifically enumerated exceptions to the LMRA codified at 29 U.S.C. § 186(c).

22. Pursuant to Title 29 U.S.C. § 186(d)(2), "any person who willfully violates" §§ 186(a) or (b) shall "upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the

value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than $10,000, or imprisoned for not more than one year, or both." 29 U.S.C. § 186(d)(2).

23. The Arbitration Award found that the Memorandum of Agreement was enforceable and further provided that this illegal agreement was to remain in effect until December 31, 2011. As a result, Mardi Gras is now an unwilling party to an illegal arrangement, whereby it must submit to the Union's illegal requests for "things of value" in violation of Sections 302(a)(2) and 302(b)(1) of the LMRA.

24. Because the Arbitration Award has bound Mardi Gras to an illegal agreement until December 31, 2011, it is contrary to public policy.

25. Accordingly, Mardi Gras seeks to vacate the Arbitration Award on the grounds that it is contrary to public policy.

WHEREFORE, Applicant, HOLLYWOOD GREYHOUND TRACK, INC., d/b/a Mardi Gras Gaming, respectfully requests that this Court: (A) Vacate the Arbitration Award's findings: (i) That the Memorandum of Agreement is enforceable; (ii) that the Memorandum of Agreement shall remain in effect until December 31, 2001; and (iii) that Mardi Gras had violated the Memorandum of Agreement; (B) in the alternative, remand to Award back to Arbitration

for reconsideration; and (C) award any further relief that this Court deems just and appropriate.

Dated: November 4, 2009.

Respectfully submitted:

ROTHSTEIN ROSENFELDT ADLER
Counsel for Applicant Mardi Gras
401 East Las Olas Blvd – Suite 1650
Fort Lauderdale, Florida 33301
Telephone: (954) 522-3456
Facsimile: (954) 527-8663
Email: bstrohsahl@rra-law.com

By: /s/ Brianne Strohsahl
Stuart Rosenfeldt, Esq.
Fla. Bar No. 316113
Brianne Strohsahl, Esq.
Fla. Bar No. 0028521
FOR THE FIRM

* * *

[Certificate Of Service, Service List,
And Civil Cover Sheet Omitted In Printing]

EXHIBIT B

HOLLYWOOD GREYHOUND RACETRACK, INC. d/b/a MARDI GRAS AND UNITE HERE LOCAL 355	* ARBITRATION OPINION AND DECISION * AAA CASE # 32 300 00639 08 * CARD CHECK NEUTRALITY AGREEMENT * ARNOLD M. ZACK, ARBITRATOR * DATE OF DECISION: 8/6/09

On June 17, 2009, I held a hearing in Ft. Lauderdale, FL, to arbitrate the following dispute. Stuart A. Rosenfeldt, Esq., represented the Employer. Noah Scott Warman, Esq., represented the Union. By July 9, 2009, I received post-hearing briefs plus three disks of citations.

THE ISSUE

The parties agreed upon the issue to be decided as follows:

> "Whether the Memorandum of Agreement entered into by and between the parties is enforceable?"

THE FACTS

On August 23, 2004, the parties signed a Memorandum of Agreement reading in part as follows:

"1. This Agreement shall cover all employees employed in classification in the bargaining unit described in Exhibit A or in classifications called by different names when performing similar duties at any and every casino, racino, and/or other facility . . . for any type of gaming . . . which is owned by . . . the Employer.

4. The Employer will take a neutral approach in the unionization of the employees. The Employer will not do any action or make any statement that will directly or indirectly state or imply any opposition by the Employer to the selection by such employees of a Collective Bargaining Agent or preference for or opposition to any particular union as a bargaining unit. . . .

8. Within 16 days following receipt of written notice of intent to organize employees, the employer will furnish the Union with a complete list of employees including both full and regular part-time employees, showing their job classification, departments, and addresses. Thereafter, the Employer will provide updated complete lists monthly or at a longer period of time if the Union does not request the lists monthly.

9. If the prescribed review by the arbitrator establishes that a majority of such employees has designated the Union as their

> exclusive collective bargaining representative . . . the Employer will recognize the Union as such representative of such employees . . .
>
> 11. During the life of this Agreement, the Union will not engage in a strike, picketing, or other economic activity at any gaming facility covered by this Agreement . . .
>
> 15. This Agreement shall be in full force and effect for four years from the installation of the first slot machine . . . or . . . gaming device at the gaming facility."

The evidence shows that Mardi Gras furnished the Union with lists of employees and their contract information on or about December 2006 when the facility opened and the first gambling machine appeared. A second list was provided several months later.

In May 2008, when the Union requested an updated list of employees, the Employer did not respond, having obtained new legal counsel which was of the view that the Memorandum of Agreement violated the Labor Management Relations Act. According to Chris Magoulas, Deputy Director of the National Gaming Division of UNITE HERE, several subsequent requests were apparently ignored. The Union's demand for arbitration for noncompliance with the Memorandum of Agreement was rejected by the Employer.

In September 2008, the Union sued in Federal Court to compel arbitration.

On April 16, 2009, the U.S. District Court entered an order to grant the Union's "Motion to Compel Arbitration and direct the parties to arbitrate the entire dispute including UNITE HERE's claims and Hollywood's counterclaims".

POSITION OF THE EMPLOYER

Mardi Gras argues that demands for delivery of items of value within the Memorandum of Understanding are prohibited by Section 302 of the LMRA. Included in its items of "things of value" are 1) lists of information regarding employees, 2) access to Employer premises and certain non-public areas to engage in organizing efforts, and 3) control over employers communication with its employees as to its views on the Union and unionization.

The Employer asserts that Section 302 (a)(2) prohibits employers from divulging "anything of value" to a union with certain flat and specified exceptions allowed under Section 302(c). It notes that under *United States v. Sun Diamond Growers*, 526 U.S. 398 (2007), the Court held it to be "a felony for an employer to give a union representative . . . anything of value", and that under *Bugher v. Consolidated X ray Service Corp*, 705 F2nd 1426 (1983), the 5th Circuit reiterated that Section 302 "prohibits employers . . . from paying anything of value to labor organizations or their officials and conversely prohibits labor

representatives from receiving anything of value from employers". It further cites *Arroyo v. U.S.* 359 U.S. 425 (1959), where the Court stated that the strict prophylactic ban was intended to preclude any possibility of "bribery of employee representatives by employers" or "extortion by employees' representatives".

The foregoing citations, according to the Employer, show that the Memorandum of Agreement provisions requiring Mardi Gras to assist and effectively subsidize the Union by providing it with physical access to otherwise restrictive private property, lists of employees' names, and personal information and forced neutrality as to unionization would certainly be considered prohibited "things of value". It argues that promises of information, access, and control over Employer communications is just as easy and as much an improper influence as outright bribery because Unions covet such assistance. Such demands, it continues, are the extorted price for "labor peace" in the Union's promise not to picket, boycott, or strike Mardi Gras.

The Employer further asserts that the phrase "things of value" should be broadly construed noting that the modifying word, "any" in the statute, according to *Local 144 Nursing Home Panesian Fund v. Demisy* 508 U.S. 581 (1993), indicates that the prohibitions of the subsections of the LMRA are to be broadly drawn. It urges such an expansive interpretation and notes that the use of the word "money", with the addition of the words "or other things of

value" encompass both tangibles and intangibles, including things which do not have monetary worth.

The Employer also asserts that information, access, and control over Employer communications are indeed "things of value", citing the Union's need for the lists to provide information to workers, to facilitate its recognition, and to forestall the extraordinary burden of increased organizing expenses and lost revenues. The provision of lists, access to Mardi Gras' private property, and the Employer's forced neutrality would reduce Union reliance on paid staff to foster Union support, while by the Union's own admission, the employer's stance has resulted in increased Union organizing expenses and lost revenue, clearly establishing that the Employer's organizing assistance constitutes "a thing of value", both monetary and intangible.

The Employer challenges the Union's policy of bypassing the NLRA's election and secret ballot procedures and the benefits of robust debate about unionization; its insistence on using the Memorandum of Agreement procedures it undertook here, underscores its great value to the Union. It contends that lists of information about non-union employees, access to property, and use of physical facilities and control over Mardi Gras' communication with its non-union employees including refraining from positions of opposition to unionization, are all things of great significance with monetary as well as intangible value to the Union.

The Employer argues that decisions from other Circuits interpreting Section 302 of the LMRA are unpersuasive in considering Memoranda of Agreement as providing things of value in their entirety rather than focusing on specific items as violative of Section 302. It notes that the facts in those cases showed they lacked comparable obligations to provide monthly lists of employees' names and contact information.

The Employer takes the position that the Memorandum of Agreement is void as an impermissible restriction on Mardi Gras' first Amendment rights, that the "gag clause" provides the Union with control over employees and prohibits Mardi Gras from speaking out about unionization or discussing references to the Union. It cites court decisions which endorse the Employer's free speech rights to communicate their views to their employees as well as the Congressional intent to encourage free debate on labor management issues.

The Employer argues that it has the requisite standing to assert its counterclaim that the Memorandum of Agreement is illegal because of the significant possibility of future harm, and a right to a determination that the Memorandum of Agreement is invalid and amendable to rescission. Further, it continues, its October 18, 2008 counterclaim was timely filed within six months of both the Union's unanswered and improper demands for employee lists. It asserts that Mardi Gras was subject to harm due to the infringement of its rights and possible criminal

liability, but was not aware that the Contract was illegal until it enlisted Counsel in 2008, and would never have signed in 2004, if had then been aware of such potential for criminal penalty. It also adds that its filing of the counterclaim in October 2008 was well within four years of the installation of the first gaming machine in December 2006, the effective date of the 2004 Memorandum of Agreement.

Finally, the Employer argues that the Union is not entitled to attorneys' fees incurred in this action since such remedy is authorized by neither statute nor the Memorandum of Agreement.

In the light of the foregoing, the Employer requests the Union's grievance be dismissed and all relief requested by the Union be denied.

POSITION OF THE UNION

The Union argues that the Employer's claim of illegality lacks merit, that in Section 301 of the LMRA, Congress intended to make labor contracts equally binding on both employers and unions in order to promote industrial peace through enforcement of these contracts, including the anticipated non-strike clauses contained therein, while Section 302 was to make it a crime for an employer to deliver a thing of value to the union's representative, and for a union representative to request or receive such, with heavy sanctions for any violation of those prohibitions. It cites *Retail Clerks vs. Lion Dry Goods* 369 U.S. 17 (1962), as endorsing agreements in addition to the Collective

Bargaining Agreement as enforceable even where the contracting union is not currently the bargaining representative for the employees. The Agreement in that case, the Union continues, would have been illegal and unenforceable if Mardi Gras were correct in its interpretation of Section 302. It cites a number of Circuit Court decisions since *Lion Dry Goods* upholding agreements between employees and non-incumbent unions which govern procedures for future organizing and recognition as lawful and enforceable under Section 301. All those decisions reject the Section 302 agreement made here by the Employer. The Union cities [sic] quotes from *Hotel Employees and Restaurant Employees Union Local 57 v. Sage Hospitality* 390 F3rd (3rd Circuit 2004) Cert.den. 554 U.S. 1010 (2005), as noting that Section 302 was passed to address bribery, extortion, and other corrupt practices conducted in secret, in contrast with the parties' negotiated Neutrality Agreement which involved "no payment, loan, or delivery of anything" in which a neutrality agreement like any other labor arbitration agreement benefits both parties with efficiency and cost saving and does not transform itself into or payment or delivery or some benefit". Furthermore, any benefit to the Union inherent in a more efficient resolution of recognition disputes does not transform it into a "thing of value" within the meaning of the statute.

It cites other Circuit Court and District Court decisions reasoning in support of provision of lists of

employees, Union access to the workplace, and neutrality pledges as consistent with that ruling.

The Union asserts that Congress has repeatedly revisited and amended Section 302 since the Lyon Dry Goods decision without ever overruling it, which, it continues, is unsurprising, since Congress would not make achievable under Section 301(a) that which it intended to make criminal under Section 302.

The Union points out that it has long been established public policy to require the Employer to furnish the Union with a list of employees to enable Union officials to contact members of the bargaining unit and that it makes no sense for the Employer to argue that criminal law forbids an employer from voluntarily acceding to a request for a list which the law would, in any event, require the Employer to provide.

In common sense terms, the Union continues, there is no suggestion that the alleged monetary value of the privileges provided to the Union exceed the monetary value of the benefits the Union provided the Employer by refraining from any picketing, boycotts, or strikes, while also agreeing to support the political campaign to a gaming authorization.

The Union asserts that when a choice is to be made between two differing readings of what conduct Congress has made a crime, any ambiguity should be resolved in favor of the non-criminal, and notes that there is no evidence of any prosecutions under Section 302 to bar neutrality and card check agreements.. It cites the nine federal judges who have

rejected identical Section 302 attacks on card check neutrality agreements and argues that the Employer is simply trying to "run out the clock" on this Agreement so that the Union will have no time to organize its workforce.

The Union asserts that the appropriate remedy in this case includes extending the time during which the Employer must comply with its promises under the Agreement.

It argues that over a year has been wasted because of the Employer's stonewalling tactics during which it has not provided the promised lists or allowed access to employees. It notes that a number of arbitrators have endorsed such a remedy by extending the time during which the Employer must be required to abide by its commitment to remain neutral, provide access, and provide employee lists. In addition, the Union requests that I order the Employer to send a mutually agreeable letter to any employee to whom the Employer has directed any anti-union comments.

Finally, the Union requests that I award the Union attorneys' fees for the cost of the court litigation insisted on by the Employer, particularly because the Employer, by forcing litigation, deprived the Union of the inexpensive and cost efficient access to arbitration, that the parties initially agreed to.

In the light of the foregoing, the Union contends that I should find that the Memorandum of Agreement fully complies with the law and rejects the

Employer's claims of illegality while granting the remedies of agreement extension, and requires the issuance of corrective letters as well as attorneys' fees.

DISCUSSION

The recognized role of an arbitrator under a Collective Bargaining Agreement is confined to interpreting and applying the language of the parties' negotiated and jointly agreed to contract. It is the interpreting and applying of that negotiated language rather than external law which is the main thrust of the arbitrator's responsibility. In this case, however, where there is a negotiated Memorandum of Agreement rather than the traditional Collective Bargaining Agreement, and where my jurisdiction is established pursuant to an Order granting a Motion to Compel Arbitration, I am charged as follows:

> " . . . the issue of the Memorandum of Agreement's legality must be considered by the arbitrator in the first instance . . . Thus, the Court will grant UNITE HERE's motion to compel arbitration and send the entire case, including UNITE HERE's claim and Hollywood's counterclaim to arbitration."

The evidence shows that the Memorandum of Agreement between these two parties was one of many negotiated between a consortium of race track owners and UNITE HERE to promote a political campaign to secure voter support for additional licenses for gaming facilities in the area. According to the

testimony of Deputy Director Magoulas, the Memorandum of Agreement negotiated in this case was one of some two dozen card check agreements under which employers agreed to provide updated lists of employees, provide Union access to employee property, and remain neutral in the Union's organizing efforts. In return, according to Mr. Magoulas, the Union, in addition to promising to refrain from picketing and striking, brought in people to do door-to-door canvassing of Union members, urging them to vote in support of the employer's effort. According to the unrebutted testimony of Mr. Magoulas, the Employer's spokesman was assisted by an attorney in negotiating the Memorandum of Agreement. Mr. Magoulas testified that Daniel Atkins, the Employer's representative, returned to negotiating sessions "reporting back what his attorney had said" on the various issues under discussion.

Although there was no certified union in place at the time of these negotiations, I am persuaded that they were the type of arms-length negotiations anticipated by the Court in *Retail Clerks v. Lion Dry Goods* 369 U.S. 17 (1962), an arms-length agreement between an employer and a non-incumbent union to set forth the procedure for future organization and recognition, and thus enforceable under Section 301.

It is clear from reading the Opinion of Mr. Justice Brennan in that case that the Court viewed Section 301 as covering union/management agreements beyond the traditional Collective Bargaining Agreement.

As he noted (369 U.S. 23, 25-26),

> "First, the section says "Contracts", though Congress knew well the phrase "Collective Bargaining Contracts", had Congress contemplated a restrictive differentiation we may assume it would not have eschewed "collective bargaining contracts" unwittingly . . .
>
> Second, if "contracts" means only Collective Bargaining Contracts, the subsequent words "or between any such labor organizations", are superfluous . . . Congress was not indulging in surplusage, a federal forum was provided for actions on other labor contracts besides Collective Bargaining Contracts . . . "

I conclude from the foregoing, that an agreement between a union and an employer establishing procedures for an expeditious and cost saving means for determining the union preference of employees is covered by Section 301. In such light, I find the Employer's claim that it was forced into an illegal scheme in violation of Section 302 to be unpersuasive. By its reasoning, any agreement other than a Collective Bargaining Agreement, where the Employer and the Union exchange things of even non-material mutual value, such as arguably, a list of employees, access to employer premises, and a promise of neutrality, and a promise to refrain from striking and picketing, would subject one or both parties to criminal charges. The Court's decision in *Retail Clerks vs. Lion Dry Goods,* never restricted, despite subsequent legislative revisions to the Statute, convinces me that

such a pre-Collective Bargaining Agreement is valid under Section 301. I am also persuaded by the nature and evidence of the negotiations that the parties' objective was indeed the furtherance of the goals of the statute, rather than as the Employer suggests, to engage in action prohibited by Section 302 and thus thwart the objectives of the LMRA.

Furthermore, as I read Section 302 and the cited cases, the three "items" which the Employer's brief cites as having been "demanded" from Mardi Gras, the lists, premises access, and a neutrality commitment, are hardly manifestations of corruption, bribery, extortion, or evidence of abuse by Union officials. The thrust of Section 302 that such payments are to dupe the employees from exercising their rights does not fit in this case. Rather, here, the terms appear to be the mutual exchange in a mutually beneficial arrangement which indeed, might have had even greater benefit to the Employer by assuring Union support for its political effort to secure the right to develop gaming rights for its facility. As I understand Section 302, the provision is intended to prevent destruction or manipulation of the independence of the Union, and to thwart its representational role on behalf of its members. As noted by Mr. Justice Stewart, in *Arroyo v. U.S.* 359 U.S. 919, 425 [sic] (1959),

> "The provision (Section 302) was . . . aimed at practices which Congress considered inimical to the Integrity of the collective bargaining process".

Here, the Memorandum of Agreement is not only to benefit union members but is also assuring benefits to the Employer at the same time and is thus a laudable demonstration of union and management independence in negotiating a creative path to determining the desires of the covered employees through a peaceful procedure between those parties prior to negotiating a Collective Bargaining Agreement.

The Employer's assertion might be more persuasive if there were some evidence that the benefits extended to the Union somehow fell within the prohibited conduct or were for prohibited motives which were the bases of the restrictions set forth in Section 302. But there were no Employer witnesses to testify to any such nefarious intent or conduct as proscribed by Section 302. To the contrary, the exchange of commitments that are set forth in the Memorandum of Agreement are benefits for the Employer as well, in eliminating the potential for hostile organizational campaigning and are to my observation exactly the type of open transparent representational undertaking that is encouraged by Section 301(a) for efficient and cost saving determination of employee representation wishes.

Indeed, as noted above, to endorse the Employer's view of the Memorandum of Agreement as a violation of Section 302 because it provides obvious assistance to the Union in its role as potential employee representatives would vitiate the public policy prescribed in Section 301, by criminalizing the very

union and employer agreements that the statute undertakes to advance.

Additionally, we find no justification for denying to unions the agreed-upon provision of lists of employees in a voluntary arrangement between the parties, as manifested in their Memorandum of Agreement, when that list is in any event required of the Employer once the organizational process is undertaken.

The evidence is clear that the Memorandum of Agreement was voluntarily entered into by the parties, apparently one of two dozen covering similar facilities, that the Employer had the benefit of access to counsel in the negotiation of that Agreement, and that the terms thereof were openly negotiated and agreed upon in good faith. It therefore follows that the commitment by the Employer to take a neutral approach to the unionization of its employees and to refrain from "any action" or "statement" that would directly or indirectly state or imply any opposition by the Employer to the selection or preference for any opposition to any particular union or bargaining agreement has been violated.

Given the trade-offs and negotiations inherent in reaching agreements on the various components of the four-page 15-section Memorandum, I also find it difficult to accept the Employer's argument that, against its wishes, it was forced it [sic] surrender its First Amendment rights by being made to agree to any "gag clause" granting the Union control over

Mardi Gras' communications with its non-union employees, and thus prohibited from speaking out about unionization. To the contrary, I am persuaded that the Employer knowingly and voluntarily agreed to the conditions set forth in the Memorandum of Agreement and that in agreeing to the neutrality clause in Paragraph 4, it was not improperly deprived of any First Amendment rights.

That 2004 Agreement was legal and binding on the parties. In addition, I find no grounds for finding that the Agreement imposed upon Mardi Gras any unlawful obligation to provide anything of value to the Union in violation of Title 29 U.S. Section 186(a)(2). In any event, were there any basis for raising a counterclaim based on the illegality of the Memorandum of Agreement that action should have occurred either within six months of the signing of the Agreement or at the time of the Union's initial request for the list of employees. The evidence shows that there was no such timely protest and that indeed the initial and perhaps one or more subsequent request [sic] for the employee list was complied with, further underscoring the viability of and initial willful compliance with that Memorandum of Agreement. It was apparently not until 2008, that the Employer undertook to challenge the Agreement it had previously voluntarily entered into and initially implemented.

As to the Employer's claim for relief in the form of rescission of the Agreement, I am persuaded that the Agreement was knowingly and voluntarily entered into and implemented without any timely

protest of any harm to or invasion of the Employer's legal rights. I am not persuaded that the Contract which the Employer signed in 2004 with apparent access to legal counsel, an arrangement entered into and successfully implemented at its outset, suddenly became illegal when it was the Employer that was responsible for the denied lists which underlay the Union's initiation of litigation.

Although its [sic] is true that Paragraph 15 of the Agreement calls for the Agreement to be in "full force" and in effect for four years from the installation of the first slot machine, which occurred around December 2006, and that the parties made provisions for earlier invocation if certain conditions were met it is clear that the parties signed the document on August 23, 2004, and it is my view that any adverse impact arising from the illegal requirements of the Agreement upon the Employer should have been known and acted upon at the time of signing or when initially requested to provide the employee lists. To the contrary, the evidence shows that the Employer showed endorsement of the Agreement by initially providing the requested employee lists.

In the light of the foregoing, I conclude that the Memorandum of Agreement entered into by the parties on August 28, 2004 is enforceable.

There is no question that the time frame agreed to by the parties for the Union to secure access to the Employer's list of employees, and to the employees themselves has been eroded by the refusal of the

Employer to comply with the Agreement's terms. In recognition of the year or more of deprived access to the requested list of employees, and in order to provide for the implementation of the Agreement as anticipated by the parties. I find the four-year period scheduled to run from the installation of the first gaming machine around December 2006 shall be extended to December 31, 2011.

There remains the Union's request for reimbursement of attorneys' fees for its efforts in securing compliance with the parties' Memorandum of Agreement. It is clear that the parties embraced arbitration as the procedure to be invoked, in the event of potential noncompliance. Paragraph 4 contains a lengthy explanation as to how the arbitrator is to be selected and the arbitrator assigned, including the authority to order the non-compliant party to comply with the Agreement. The parties agreed to require a final and binding order supported by a written statement of the reasons for the order and go so far as to provide for entry of the arbitrator's order in court. However, that language ordering the non-compliant party follows the terms of the Memorandum of Agreement, omits reference to any make whole remedy to the party seeking the other party's compliance, and omits any reference to reimbursement of attorneys' fees. If either had been the intent of the parties in confronting the possibility of non-compliance, it was incumbent upon them in setting forth such carefully proscribed procedures to so provide. Accordingly,

the Union's request for attorneys' fees is denied as is the Union's request for an order to issue a joint letter.

DECISION

The Memorandum of Agreement entered into by and between the parties is enforceable. The Agreement shall remain in effect until December 31, 2011 to remedy the Employer's breach thereof.

/s/ Arnold M. Zack
Arnold M. Zack

EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-61760-CIV-ZLOCH

HOLLYWOOD GREYHOUND TRACK, INC.,

Applicant,

vs.

ORDER

UNITE HERE LOCAL 355,

Respondent.
_____/

THIS MATTER is before the Court upon Applicant Hollywood Greyhound Track, Inc.'s Motion To Partially Vacate Arbitration Award (DE 1), Respondent Unite Here Local 355's Counter-Motion To Confirm Arbitration Award (DE 4) and Non-Party Martin Mulhall's Motion To Intervene (DE 20). The Court has carefully reviewed said Motions, the entire court file and is otherwise fully advised in the premises.

By its instant Motion (DE 1), Applicant Hollywood Greyhound Track, Inc., d/b/a Mardi Gras Gaming ("Mardi Gras") seeks to vacate the arbitration award entered against it in AAA Case # 32 300 00639 08, pursuant to 9 U.S.C. § 10 and Section 302(a)(2) of the Labor Management Relations Act, 29 U.S.C. § 186(a)(2).

The underlying dispute between the Parties in this case arises from a Memorandum of Agreement

they entered into on or about August 23, 2004. DE 1, ¶ 7. Pursuant to this Agreement, Mardi Gras was to provide Unite Here Local 355 with complete lists of Mardi Gras's employees including their job classifications and contact information on a monthly basis, was to grant access to its private premises for its employees and union representatives for organizational purposes, and was to take a neutral approach in the unionization of employees. *See* DE 1, ¶¶ 7-8; *see also* DE 4-1, pp. 1-2. In exchange, Unite Here Local 355 agreed to "not engage in a strike, picketing, or other economic activity at any gaming facility" covered by the Agreement. *See* DE 4-1, p. 2. After obtaining new counsel in 2008, Mardi Gras came to believe the Memorandum of Agreement between itself and Unite Here Local 355 violated Section 302 of the Labor Management Relations Act by requiring it to provide "things of value" to the Union and was therefore illegal. *See* DE 1, ¶¶ 9-10.

Unite Here Local 355 filed a Petition And Complaint To Compel Labor Arbitration pursuant to the terms of the Parties' Agreement, in Case No. 08-61655-CIV-SEITZ. In that case, the Court granted Unite Here Local 355's Petition and closed the case after noting that Hollywood Greyhound Track, Inc. did not challenge the arbitration clause itself, which provided that "any disputes over the interpretation or application" of the Memorandum of Agreement would be submitted to expedited and binding arbitration. *See* Case No. 08-61655-CIV-SEITZ, DE 27.

On June 17, 2009, the Parties participated in an arbitration hearing before Arbitrator Arnold M. Zack in Fort Lauderdale, Florida to determine whether the Memorandum of Agreement entered into between them was enforceable. *See* DE 1, ¶ 14; *See also* DE 4-1. On August 6, 2009, the Arbitrator entered an Opinion and Decision (DE 4-1) finding that the Memorandum of Agreement was enforceable and remained in effect until December 31, 2011, to remedy Mardi Gras's breach of the Agreement. *See* DE 1, ¶ 15; *See also* DE 4-1. Thereafter, Applicant Mardi Gras initiated the above-styled cause and now moves to vacate the Arbitrator's Award on the basis that it upheld an illegal agreement and is therefore contrary to public policy. *See* DE 1, ¶¶ 17 & 25.

Applicant Mardi Gras agrees that the Federal Arbitration Act is applicable to its Motion To Partially Vacate Arbitration Award and asserts that a district court "may vacate an arbitration award on either statutory or nonstatutory grounds." *Id.* at ¶ 18. However, the Eleventh Circuit has recently held in *Frazier v. CitiFinancial Corp., L.L.C.*, 604 F.3d 1313, 1324 (11th Cir. 2010), that the non-statutory, judicially-created grounds for vacating an arbitration award it recognized in prior precedent are no longer valid in this Circuit, following the Supreme Court's decision in *Hall Street Assoc., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). Thus, there remain only four narrow circumstances which permit vacatur under section 10 of the statute. Section 10 of the Federal Arbitration Act provides as follows:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration –
>
> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10. Applicant Hollywood Greyhound Track, Inc. d/b/a Mardi Gras does not allege any of these statutory grounds in its Motion To Partially Vacate Arbitration Award (DE 1). Mardi Gras does allege, in its Reply To Response To Motion To Partially Vacate Arbitration Award And Response To Counter Motion To Confirm Arbitration Award (DE 16), that the portion of the Arbitrator's Award which imposes a one (1) year extension of the Agreement should be vacated and Respondent's Motion To Confirm this portion of

the Award should be denied because "the Arbitrator improperly exceeded the scope of his authority under the Agreement when he extended the duration of the Agreement beyond its express terms." *See* DE 16, p.1. This is the only statutory ground raised by Mardi Gras.

Mardi Gras argues, "while the Arbitrator may have had the authority to pass upon the validity of the agreement and to order that the parties comply with it, he was not at liberty to go a step further and extend the parties' bargain beyond the Agreement's express duration." DE 16, pp. 3-4. The Arbitrator's Award cites portions of the Parties' Agreement including the provision that states "[t]his Agreement shall be in full force and effect for four years from the installation of the first slot machine . . . or . . . gaming device at the gaming facility." DE 4-1, p. 2. The Arbitrator noted in his decision that there was "no question that the time frame agreed to by the parties for the Union to secure access to the Employer's list of employees, and to the employees themselves has been eroded by the refusal of the Employer to comply with the Agreement's terms." *Id.* at p. 11. The Arbitrator ordered, "[i]n recognition of the year or more of deprived access to the requested list of employees, and in order to provide for the implementation of the Agreement as anticipated by the parties," that the four-year period scheduled to run from the installation of the first gaming machine around December 2006 would be extended to December 31, 2011. *Id.*

In crafting the Award, the Arbitrator recognized that Mardi Gras's argument, that the Memorandum of Agreement was illegal, lacked merit and that Mardi Gras had, therefore, unjustifiably breached the Parties' Agreement. After finding that the Memorandum of Agreement was enforceable, however, the Arbitrator could not craft a remedy when one was not provided for by the Agreement itself and when the only issue submitted to him was "[w]hether the Memorandum of Agreement entered into by and between the Parties is enforceable." *See* DE 4-1, p. 1. Thus, the Court finds, the Arbitrator exceeded his authority by extending the Parties' Agreement beyond the express terms of the Agreement. Accordingly, the portion of the Arbitrator's Award that extends the Parties' Agreement by an additional year, to December 31, 2011, will not be confirmed and will be vacated pursuant to 9 U.S.C. § 10(a)(4).

The only other basis for vacatur alleged by Mardi Gras, aside from the claim the Arbitrator exceeded his authority by extending the duration of the Agreement, is that by finding the Memorandum of Agreement was enforceable and was to remain in effect until December 31, 2011, the Arbitration Award bound Mardi Gras to an illegal agreement and is therefore contrary to public policy. *See* DE 1 ¶¶ 17-25. This is not a statutory ground for vacatur.

In *Buckeye Check Cashing, Inc. v. Cardegna,* the Supreme Court made clear that "a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator."

546 U.S. 440, 449 (2006); *see Jenkins v. First American Cash Advance of Georgia, LLC*, 400 F.3d 868, 881 (11th Cir. 2005) (explaining that when there are allegations of illegality as to an underlying transaction, and not to the arbitration agreement itself, it is for the arbitrator to determine whether the underlying transactions are illegal and void). Hence, Mardi Gras's claim that the Agreement between itself and Unite Here Local 355 is illegal was to be determined by the Arbitrator. *See Buckeye Check Cashing, Inc.*, 546 U.S. at 446. The Arbitrator determined that the Memorandum of Agreement, entered into by Mardi Gras and Unite Here Local 355, was not illegal and was in fact valid and enforceable. *See* DE 4-1. Mardi Gras does not challenge this determination on any statutory ground and pursuant to the Eleventh Circuit decision in *Frazier v. CitiFinancial Corp., L.L.C.*, non-statutory grounds are no longer a basis for vacatur. 604 F.3d at 1324. However, even if Mardi Gras's claim, that the Agreement between itself and Unite Here Local 355 is illegal, could conceivably be construed as a statutory challenge, the Court would find this challenge to be without merit.

The Federal Arbitration Act "severely limits judicial vacatur and modification of an arbitration award." *AIG Baker Sterling Heights, L.L.C. v. American Multi-Cinema, Inc.*, 579 F.3d 1268, 1271 (11th Cir. 2009). And the Court, upon application of any party to the arbitration, "*must* confirm the arbitrator's award unless it is vacated, modified, or corrected in accordance with sections 10 and 11 of the statute."

Frazier, 604 F.3d at 1321, *citing* 9 U.S.C. § 9 (emphasis in original). The Eleventh Circuit, in holding that judicially-created bases for vacatur are no longer valid in light of the Supreme Court's decision in *Hall Street*, agreed with the Fifth Circuit that the "categorical language of *Hall Street*" compels the conclusion that sections 10 and 11 of the Federal Arbitration Act provide exclusive regimes for the review provided by the statute. *See Frazier*, 604 F.3d at 1324. Thus, the portion of the Award which extends the Parties' agreement for one year will be vacated pursuant to 9 U.S.C. § 10(a)(4) and the remainder of the Award will be confirmed pursuant to 9 U.S.C. § 9. Accordingly, Applicant Hollywood Greyhound Track, Inc. d/b/a Mardi Gras's Motion To Partially Vacate Arbitration Award (DE 1), which seeks to vacate the Arbitration Award on non-statutory grounds, will be denied and Respondent Unite Here Local 355's Counter-Motion To Confirm Arbitration Award (DE 4) will be denied as to the portion of the award which extends the Parties' agreement by one year and granted as to the remainder of the Award.

The Court now turns to non-party Martin Mulhall's Motion To Intervene (DE 20).By his Motion (DE 20), Mr. Mulhall seeks to intervene in the above-styled cause to vacate the Arbitration Award entered in favor of Unite Here Local 355. The only issue before this Court is whether the subject Arbitration Award should be vacated pursuant to any of the limited statutory grounds provided by the Federal

Arbitration Act. The Federal Arbitration Act provides that a United States court may issue an order vacating an arbitration award "upon the application of any party to the arbitration." 9 U.S.C. § 10(a). Mr. Mulhall is not a party to the underlying arbitration and does not meet the requirements of Federal Rule of Civil Procedure 24(a) such that the Court must permit him to intervene. Mr. Mulhall does not claim an interest relating to the transaction that is the subject of this case that is "so situated that disposing of the action may as a practical matter impair or impede" his ability to protect his interest. *See* Fed. R. Civ. P. 24(a). Thus, Non-Party Martin Mulhall's Motion To Intervene (DE 20) will be denied.

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED as follows:

1. Applicant Hollywood Greyhound Track, Inc.'s Motion To Partially Vacate Arbitration Award (DE 1) be and the same is hereby **DENIED**;

2. Respondent Unite Here Local 355's Counter-Motion To Confirm Arbitration Award (DE 4) be and the same is hereby **DENIED** in part and **GRANTED** in part as follows:

a) Respondent Unite Here Local 355's Counter-Motion To Confirm Arbitration Award (DE 4) be and the same is hereby **DENIED** as to the portion of the Award that extends the Parties' Agreement by one year;

b) The portion of the Award that extends the Parties' Agreement by one year be and the same is hereby **VACATED** pursuant to 9 U.S.C. § 10(a)(4);

c) Respondent Unite Here Local 355's Counter-Motion To Confirm Arbitration Award (DE 4) be and the same is hereby **GRANTED** as to the remainder of the Award;

3. Non-Party Martin Mulhall's Motion To Intervene (DE 20) be and the same is hereby **DENIED**; and

4. Final Judgment will be entered by separate Order.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 6th day of August, 2010.

/s/ William J. Zloch
WILLIAM J. ZLOCH
United States District Judge

Copies furnished:

All Counsel of Record

EXHIBIT D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-61760-CIV-ZLOCH

HOLLYWOOD GREYHOUND TRACK, INC.,

Applicant,

vs.

UNITE HERE LOCAL 355,

Respondent.
_____/

ORDER OF FINAL JUDGMENT CONFIRMING ARBITRATION AWARD

THIS MATTER is before the Court upon Respondent Unite Here Local 355's Motion to Confirm Arbitration Award (DE 4), which the Court granted in part by separate Order. The Court has carefully reviewed said Motion, the entire court file and is otherwise fully advised in the premises.

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED as follows:

1. This Court has personal jurisdiction over the parties hereto and the subject matter herein;

2. The Arbitration Award (DE 4-1) entered regarding the parties herein in AAA Case No. 32 300 00639 08, be and the same is hereby **CONFIRMED** pursuant to 9 U.S.C. § 9 as to all but the portion of the Award that extends the Parties' agreement by one year;

3. Pursuant to Federal Rule of Civil Procedure 58, Final Judgment on said Award be and the same is hereby **ENTERED** in favor of Respondent Unite Here Local 355 and against Applicant Hollywood Greyhound Track, Inc. consistent with the terms of this Order; and

4. To the extent not otherwise disposed of herein, all pending Motions be and the same are hereby **DENIED** as moot.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 6th day of August, 2010.

/s/ William J. Zloch
WILLIAM J. ZLOCH
United States District Judge

Copies furnished:

All Counsel of Record

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-CV-61766-SEITZ/O'SULLIVAN

MARTIN MULHALL,

Plaintiff,

v.

UNITE HERE LOCAL 355,
HOLLYWOOD GREYHOUND TRACK, INC.,
d/b/a MARDI GRAS GAMING,

Defendants.

PLAINTIFF'S OPPOSITION TO UNITE HERE LOCAL 355's MOTION TO DISMISS

(Filed Dec. 17, 2010)

This is an action by employee to stop a union from receiving unlawful assistance from his employer with unionizing him and his co-workers under § 302 of the Labor Mangement Relations Act ("LMRA"), 29 U.S.C. § 186. Section 302 makes it illegal for a union to demand or receive any "thing of value" from an employer subject to exceptions inapplicable here. 29 U.S.C. § 186. As explained below, UNITE is violating § 302 by demanding from an employer valuable information, use of its property, and control over its communications.

STATEMENT OF FACTS

On a motion to dismiss, the facts stated in the Complaint must be accepted as true. *See Young*

Apartments, Inc. v. Town of Jupiter, 529 F.3d 1027, 1037 (11th Cir. 2008). Plaintiff Martin Mulhall is an employee of Mardi Gras Gaming at its racetrack-casino in Hollywood, Florida. (Compl., ¶ 5). Mulhall and his co-workers are nonunion. (*Id.*, ¶ 7). Yet, their employer is a party to a Memorandum of Agreement ("MOA") with UNITE HERE Local 355 in which the employer agreed to assist UNITE with unionizing its employees in exchange, *quid pro quo*, for UNITE's support of a ballot initiative and promises of labor peace. (*Id.*, ¶¶ 8-11).

Specifically, Mardi Gras agreed to assist UNITE with unionizing its employees by delivering three types of assistance to the union: (1) information about Mardi Gras' nonunion employees, including their home addresses, (*id.*, ¶ 15); (2) access and use of Mardi Gras' property for organizing, (*id.*, ¶ 18); and (3) a gag-clause on any speech or actions by Mardi Gras that state or imply opposition to the union, (*id.*, ¶ 21). In addition, Mardi Gras agreed to recognize UNITE as its employees' "exclusive representative" after the union collects authorization cards from a majority of employees and guaranteed UNITE a collective bargaining agreement that governs its employees' terms of employment after unionization. (MOA, ¶¶ 9-10) (Ex. A to Compl.).

In exchange for this valuable assistance, UNITE spent over $100,000 campaigning for a gaming-related ballot initiative favored by Mardi Gras.

Mulhall v. UNITE HERE Local 355, 618 F.3d 1279, 1285 (11th Cir. 2010).[1] UNITE also promised Mardi Gras labor peace, namely that it would not picket or take other economic actions against the employer. (Compl., ¶ 11).

In May and July 2008, UNITE demanded that Mardi Gras deliver the information, access, and gag-clause specified [sic] the MOA. (*Id.*, ¶ 12). When Mardi Gras refused, UNITE sought and obtained an arbitration award holding the MOA enforceable. *See Mulhall,* 618 F.3d at 1285. On 6 August 2010, Judge Zloch of this Court confirmed the award in part, but held that the duration of the MOA could not be extended. *Id.*; *see Hollywood Greyhound Race Track, Inc. v. Unite HERE Local* 355, Case No. 09-61760-Zloch (S.D. Fla. 2009) (Ex. C to D.E. 41). Under Judge Zloch's ruling, the MOA will expire by end of December 2010.

On 10 September 2010, the Court of Appeals for the Eleventh Circuit held that Mulhall has both Article III and prudential standing to challenge the MOA under § 302. *See Mulhall,* 618 F.3d at 1294. The case is now before the Court on a motion to dismiss on the merits.

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[1] This figure was derived by the Eleventh Circuit from a Joint Scheduling Report filed by UNITE with this Court. *See* 618 F.3d at 1285.

JURISDICTION

On 22 April 2009, this Court held that "§ 302 of the LMRA permits private litigants, such as Mulhall, to bring suits to 'obtain injunctions in order to protect the integrity of the employees' collective bargaining representative in carrying out their responsibilities.'" Order of 22 April 2009, at * 3 (D.E. 30) (quoting *Sinclair Ref Co. v. Atkinson*, 370 U.S. 195, 204-05 n.19 (1962)). This Court's conclusion is correct, as § 302(e) "*expressly* permit[s] suits for injunctions . . . to be brought in the federal courts by private litigants." *Sinclair*, 370 U.S. at 205 n.19 (emphasis added). By its terms, § 302(e) grants district courts jurisdiction "to restrain violations of this section without regard to the provisions of . . . section 52 of this title." 29 U.S.C. § 186(e). Section 52 applies *only* to suits between "employees" and "employers," *see* 29 U.S.C. § 52, and not to suits brought by the government. *See United States v. United Mine Workers of Am.*, 330 U.S. 258, 270 (1947). The inclusion of this exemption to § 52 in § 302(e) conclusively proves that § 302(e) grants employees a private cause of action (because the exemption is superfluous otherwise), and conclusively refutes UNITE's theory that § 302(e) provides a cause of action only to the government (because § 52 does not apply to government suits).

The courts [sic] has thus long recognized that § 302(e) grants private litigants a private cause of

action for injunctive relief.[4] No court has ever held to the contrary. Accordingly, UNITE's second request that this Court void a long-established private remedy available to employees to protect their rights should again be rejected.[5]

ARGUMENT ON THE MERITS

UNITE does not engage in a methodical analysis of § 302, but instead proffers a hodgepodge of arguments. As demonstrated below, a careful evaluation of the statute establishes that: (I) UNITE has violated the plain language of § 302; (II) enforcing § 302 as written is consistent with its legislative purpose; (III) enforcing § 302 leads to no absurd results.

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[4] *See, e.g., Sinclair,* 370 U.S. at 204-05 (Section 302(e) authorizes civil actions for injunctive relief); *Local 144, Nursing Home Pension Fund v. Demisay,* 508 U.S. 581, 587-88 (1993) (same); *Copra v. Suro,* 236 F.2d 107, 114 (1st Cir. 1956) (employees and other private entities appropriate parties for suits under § 302); *Schwartz v. Associated Musicians, Local 802,* 340 F.2d 228, 233 (2d Cir. 1964) (same); *Employing Plasterers' Ass'n v. Journeymen Plasterers Prot. & Benevolent Soc'y,* 279 F.2d 92, 99 (7th Cir. 1960) (same); W.J. Dunn, Annotation, *Civil Actions Involving Union Welfare Funds Subject to § 302 of the Taft-Hartley Act,* 88 A.L.R.2d 493 (collecting dozens of civil actions under § 302).

[5] Because 302(e) provides for an *express* private cause of action, it [sic] unnecessary to determine if a cause of action can be *implied* from § 302 under the authorities cited by UNITE.

I. UNITE's Demands Violate the Plain Language of § 302

A. *Section 302 Strictly Prohibits Unions From Receiving Any "Thing of Value" From Employers Except as Expressly Permitted by § 302(c)*

"As is true in every case involving the construction of a statute, [the] starting point must be the language employed by Congress." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979). "When . . . the terms of a statute [are] unambiguous, judicial inquiry is complete except in rare and exceptional circumstances." *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991). Section 302(a)(2) of the LMRA states:

> It shall be unlawful for any employer . . . to pay, lend, or deliver, any money or other thing of value . . . to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer.

29 U.S.C. § 186(a)(2). Section 302(b)(1) reciprocally makes it unlawful for unions to "request, demand, receive, or accept . . . any money or other thing of value prohibited by subsection (a)." *Id.* at § 186(b)(1). Section 302(c) states nine exceptions to the general prohibitions of subsections (a) and (b), none of which apply here. *Id.* at § 186(c).

"[A] literal construction of § 302 does no violence to common sense." *Arroyo v. United States*, 359 U.S.

419, 424 (1959). As the Eleventh Circuit recently reiterated, the statute simply "bans the exchange of *anything of value* between a union and an employer, subject to a strictly limited set of exceptions." *Mulhall*, 618 F.3d at 1290 (emphasis added)."

The phrase "thing of value" in § 302 is itself a "term of art" used in many statutes. *United States v. Nilsen*, 967 F.2d 539, 543 (11th Cir. 1992) (per curiam); *United States v. Girard*, 601 F.2d 69, 71 (2d Cir. 1979). The Eleventh Circuit has twice held that this phrase is broad, not limited to things with monetary worth, and encompasses intangibles.

> [T]his Court has held that the term "thing of value" unambiguously covers intangible considerations. [*Nilsen*, 967 F.2d at 542]. "This broad interpretation is based upon a recognition that monetary worth is not the sole measure of value." *Id.* at 542-43 (*citing United States v. Schwartz*, 785 F.2d 673, 679 (9th Cir. 1986)). "The conduct and expectations of both the defendant and the subject of the extortionate threat also can establish whether an intangible objective is a 'thing of value.'" *Id.* at 543 (*citing United States v. Zouras*, 497 F.2d 1115, 1121 (7th Cir. 1974)).

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[c] *See also United States v. Ryan*, 350 U.S. 299, 305 (1956); *United States v. Browne*, 505 F.3d 1229, 1248 (11th Cir. 2007); *accord* H.R. Rep. No. 86-741 (1959), *reprinted* 1959 U.S.C.C.A.N. 2318, 2469 ("it is illegal for an employer to pay or deliver anything of value to a representative of his employees, except in those instances permitted by subsection (c)").

United States v. Moore, 525 F.3d 1033, 1048 (11th Cir. 2008); *see also Nilsen*, 967 F.2d at 543 (similar). The Second, Fifth, Sixth, Seventh, Eighth, Ninth, and D.C. Circuits have similarly held that "thing of value" is a broad term that encompasses intangibles.[7]

"[T]hing of value" is used as broadly in § 302 as it [sic] in other federal statutes. The Supreme Court has repeatedly recognized that § 302's "prohibitions . . . are drawn broadly."*Demisay*, 508 U.S. at 585; *see also Ryan*, 350 U.S. at 304-05 (similar); *Arroyo*, 359 U.S. at 420 (similar). "Congress gave the broadest possible scope to the statute by adding to the word 'money' the words 'or other thing of value,'" because "favors may be conferred in many ways under many circumstances.'" *United States v. Roth*, 333 F.2d 450, 453 (2d Cir. 1964); *accord Ryan*, 232 F.2d at 482-83. Legislative history supports this broad construction of "thing of value" in § 302.[8]

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[7] *See Girard*, 601 F.2d at 71; *United States v. Williams*, 705 F.2d 603, 622-23 (2d Cir. 1983); *United States v. Marmolejo*, 89 F.3d 1185, 1191 (5th Cir. 1996); *United States v. Jeter*, 775 F.2d 670, 680 (6th 1985); *United States v. Gorman*, 807 F.2d 1299, 1305 (6th Cir. 1986); *Zouras*, 497 F.2d at 1121 (7th Cir. 1974); *United States v. Croft*, 750 F.2d 1354, 1361-62 (7th Cir. 1984); *United States v. May*, 625 F.2d 186, 191-92 (8th Cir. 1980); *Schwartz*, 785 F.2d at 680 (9th Cir. 1986).

[8] *See, e.g.*, 92 Cong. Rec. 4900 (Sen. Pepper) ("under the language of the amendment, it would be unlawful for any representatives of employees . . . to receive *anything of benefit or value* from the management"); 92 Cong. Rec. 4895 (Sen. Wheeler) ("This language clearly goes so far as to make the employer guilty of violation of the law if he contributed *anything*

(Continued on following page)

B. *Information, Use of property, and a Gag-Clause Are "Thing[s] of Value" Under § 302*

Employer assistance with organizing more employees into a union is plainly a "thing of value" to a union. *Cf Schwartz*, 785 F.2d at 679-81 (holding that "assistance in arranging for the merger of [two unions], as well as other services," are a "thing of value" to union officials under 18 U.S.C. § 1954). Specifically, each of the three types of assistance that UNITE demands from Mulhall's employer is "thing of value" under the law of this Circuit: confidential information; use of property; and a gag-clause controlling speech. Indeed, almost every organization, union and company alike, utilize information, property, and the communications of others.

Information. UNITE demands lists of confidential information about nonunion Mardi Gras employees that it wants to target in a so-called card check "election." (Compl., ¶¶ 15-17). The Eleventh Circuit recently held that information about individuals who voted absentee in an election constitutes a "thing of value" in *United States v. Jordan*, 582 F.3d 1239, 1247 (11th Cir. 2009) (construing 18 U.S.C. § 641). The information that UNITE seeks from Mardi Gras is indistinguishable from that found to be a "thing of value" in *Jordan*.

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to the union for the benefit of the union."); S. Rep. No. 86-187 (1959), *reprinted* 1959 U.S.C.C.A.N. 2318, 2329 (§ 302 intended to be "applicable to *all forms* of extortion or bribery in labor-management relations").

Indeed, "[c]onfidential business information has long been recognized as property." *Carpenter v. United States*, 484 U.S. 19, 26, 108 S. Ct. 316, 320 (1987). The Second, Sixth, and Ninth Circuits have recognized that it constitutes a "thing of value." *See Girard*, 601 F.2d at 71; *United States v. Barger*, 931 F.2d 359, 368 (6th Cir. 1991); *United States v. Sheker*, 618 F.2d 607, 609 (9th Cir. 1980). A list of prospective employees to unionize is as much a "thing of value" to a union as a list of prospective customers is a "thing of value" to a business.

Use of Property: UNITE demands that Mardi Gras permit it to use the company's property for organizing. (Compl., ¶¶ 18-20). Use of physical facilities is a quintessential property right used by almost every organization. As this Circuit (then the Fifth Circuit) recognized, union use of company property for free constitutes a "thing of value" under § 302. *See United States v. Schiffman*, 552 F.2d 1124, 1126 (5th Cir. 1977) (union official violated § 302 by accepting from a hotel "thing[s] of value" in the form of discounted hotel rooms); *see also NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849, 856 & n.5 (5th Cir. 1986) (union use of company offices a "thing of value" under § 302(a), but exempted by § 302(c)(1) because union officials were employees); *cf. United States v. Freeman*, 208 F.3d 332, 341 (1st Cir. 2000) (access to property otherwise off limits is a "thing of value" under 18 U.S.C. § 666).

Gag Clause. UNITE demands control over Mardi Gras' speech regarding unionization, namely

that it "not do any action nor make any statement that will directly or indirectly state or imply any opposition" to UNITE. (Compl., ¶ 21). Control over the speech and conduct of an adverse party is a "thing of value" under this Circuit's ruling in *Nilsen*, 967 F.2d at 542-43, and the Seventh Circuit's ruling in *Zouras*, 497 F.2d at 1121. Both cases hold that the testimony of a government witness, which a defendant wished to silence, is a "thing of value" to that defendant under 18 U.S.C. § 876. *Id.* Similarly here, UNITE seeks to silence an adverse party (Mardi Gras) that intends to speak against UNITE during an organizing campaign. (Compl., ¶ 24). The control UNITE seeks over Mardi Gras' speech and conduct is a "thing of value" under *Nilsen* and *Zouras*. Indeed, non-competition agreements are recognized as types of property. *See United States v. Tropiano*, 418 F.2d 1069, 1076 (2d Cir. 1969).

Exemptions Inapplicable. It is uncontested that the "thing[s] of value" at issue here are not covered by any of the statutory exemptions stated at § 302(c). This is significant because § 302 prohibits employer delivery of anything of value to unions *except* as permitted by § 302(c). The "philosophy underlying § 302 is prohibitory, rather than permissive. The Act permits only the exception; it does not permit the general and prohibit the exception." *Bey v. Muldoon*, 217 F. Supp. 401, 403 (E.D. Pa. 1962). That Congress did not include an exemption for organizing assistance in § 302(c) means that no such exemption is intended – *expressio unius est exclusio alterius.*

Cf. Florida Right to Life, Inc. v. Lamar, 273 F.3d 1318, 1327 (11th Cir. 2001) (statutory exemptions to a ban on certain contributions means no additional exemptions were intended).

C. *That Organizing Assistance Has Monetary and Other Value to UNITE is Indisputable on a Motion to Dismiss*

UNITE argues that a "thing of value" must have monetary value under § 302. But even if this were true – which it is not[8] – the argument fails here because the Complaint expressly states that the information, use of property, and gag-clause have "*monetary and market value*" (Compl., ¶¶ 17(c), 20(c), 25(c)) (emphasis added), and cumulatively have a "significant monetary benefit to the union because . . . it will reduce the expense of conducting an organizing campaign . . . and likely result in an increase in dues revenues for the union." (*Id.* at ¶ 26). UNITE itself has pled that it will incur "increased organizing

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[8] The Eleventh Circuit has twice held that a "thing of value" is not limited to monetary worth, but is measured subjectively. *See Moore*, 525 F.3d at 1048; *Nilsen*, 967 F.2d at 543; *accord Roth*, 333 F.2d at 453 ("[v]alue" under § 302 can be determined by the union's "desire to have the 'thing'"). While § 302(d) provides for additional criminal penalties if the value of something exceeds $1,000, 29 U.S.C. § 186(d), that criminal provision is not at issue here. Monetary value is not required under the statutory terms at issue here. Specifically, no monetary value is required to prove a violation of §§ 302(a) or (b) or obtain an injunction under § 302(e).

expenses and lost revenues" without the assistance. (Compl., ¶ 27). Because these facts must be accepted as true on a motion to dismiss, UNITE's argument inherently fails at this stage of the proceedings. *See Young Apartments,* 529 F.3d at 1037. Whether or not the assistance has monetary value is a question of fact that can only be resolved after the completion of discovery.

In any event, it [sic] abundantly clear that the organizing assistance has great monetary value to UNITE. As the Eleventh Circuit recognized, "UNITE ultimately spent $100,000 on the initiative campaign, suggesting that the organizing assistance it bargained for was *significant in a monetary sense.*" *Mulhall,* 618 F.3d at 1289 (emphasis added). Indeed, the value of the assistance can be pegged at $100,000, as value of something is usually determined by the value of the consideration provided for it. *Cf United States v. Marmolejo,* 89 F.3d 1185, 1194 (5th Cir. 1996) (prison conjugal visits constituted "anything of value of $5,000 or more" under 18 U.S.C. § 666(a)(1)(B) based on the consideration the prisoner provided in exchange for the visits).[10]

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[10] To the extent that UNITE is arguing that § 302 requires that something have value to entities other than the union, this argument is foreclosed by § 302(a)(2)'s text, which requires that something be a "thing of value . . . *to any labor organization.*" 29 U.S.C. § 186(a)(2) (emphasis added). *Cf United States v. Ostrander,* 999 F.2d 27, 31 (2d Cir. 1993) ("it is enough if the item received was regarded as a benefit by the recipient, whether or not others might have taken a different view of its value" under

(Continued on following page)

At a minimum, the organizing assistance that UNITE seeks from Mardi Gras is certainly not *worthless* to UNITE. Since § 302(e) does not require any minimum monetary value to obtain injunctive relief, UNITE's "monetary value" defense is untenable.

D. *Sage and Adcock Are Distinguishable, Contrary to Circuit Law, and Unpersuasive*

UNITE relies on two decisions from the Third and Fourth Circuits, *Hotel Employees Union v. Sage Hospitality*, 390 F.3d 206 (3d Cir. 2004) and *Adcock v. Freightliner, LLC*, 550 F.3d 369 (4th Cir. 2008). *Sage* held that an organizing agreement similar to the MOA here was not a "thing of value" under § 302. 390 F.3d at 218. *Adcock* held that union access to an employer's employees did not violate § 302. 550 F.3d 374-76.[11] These decisions are not binding on this Court. As established below, the cases are (1) distinguishable; (2) conflict with the law of this and other circuits; and (3) are wholly unpersuasive.

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18 U.S.C. § 1954, which prohibits union trustees from receiving any "thing of value"). In any event, information, use of property, and communications are things commonly bought and sold by entities other than unions for money.

[11] Information about employees was *not* at issue in *Adcock*. While a gag-clause on employer speech was before the court, it was not directly addressed by it. The court addressed only "union access to employees." 550 F.3d at 374; *see also id.* at 375 (similar).

1. *Adcock* is inapposite because the crux of the decision is that § 302 requires monetary value, and that the union access at issue lacked such value. 550 F.3d at 374-75. For this reason, the court declined to "decide the extent to which intangible items may have value under § 302." *Id.* at 375 n.3. This conclusion is impossible here, because the Complaint expressly states that the information, use of property, and gag-clause at issue here have "monetary and market value," (Compl., ¶¶ 17(c), 20(c), 25(c)), and cumulatively will have a "significant monetary benefit to the union." (*Id.* at ¶ 26). Indeed, UNITE spent over $100,000 on a political campaign in exchange for the assistance. Even if *Adcock's* erroneous holding that § 302 requires monetary value were accepted – which it should not be for the reasons stated at footnote 9 – it would not justify dismissal of the Complaint because the existence of monetary value here is incontestable.

Sage is distinguishable because the Third Circuit addressed whether an organizing agreement in its entirety is *itself* a "thing of value," instead of addressing the specific types of assistance individually. The Court framed the issue as whether a "*labor agreement* governing recognition of a labor union amounts to illegal labor bribery," and held that "[t]he *agreement here* involves no payment, loan, or delivery of anything." 390 F.3d at 219 (emphasis added). Mulhall does not allege that the MOA is itself a "thing of value" under § 302. UNITE is violating § 302 by demanding three specific "thing[s] of value" from

Mardi Gras: information; use of property for organizing; and a gag-clause. (Compl. ¶ 37). *Sage* is inapposite because the court did not address these three specific things, but instead opined on organizing agreements in their totality.

2. To the extent that *Sage* and *Adcock* are not distinguishable, their incredibly cramped construction of "thing of value" conflicts with the law of this Circuit. *Cf. Moore*, 525 F.3d at 1048; *Nilsen*, 967 F.2d at 543. Specifically, this Circuit and the Second, Sixth, and Ninth Circuits have held that information is a "thing of value." *See Jordan*, 582 F.3d at 1247; *Girard*, 601 F.2d at 71; *Barger*, 931 F.2d at 368; *Sheker*, 618 F.2d at 609. This Circuit and the Fifth have held that free use of property is a "thing of value" under § 302. *See Schiffman*, 552 F.2d at 1126; *BASF Wyandotte*, 798 F.2d at 856 & n.5; *see also Freeman*, 208 F.3d at 341. This Circuit and the Seventh Circuit have held that control over speech is a "thing of value." *See Nilsen*, 967 F.2d at 542-43; *Zouras*, 497 F.2d at 1121. To the extent that the Third and Fourth Circuits have held to the contrary, their decisions are in conflict with the law of this and other circuits.[12]

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[12] That some of the cited cases construe "thing of value" in statutes other than § 302 is irrelevant because this Circuit has held it to be a "term of art," "a clearly defined term," *Nilsen*, 967 F.2d at 543, and that it "unambiguously covers intangible considerations." *Moore*, 525 F.3d at 1048; *accord Girard*, 601 F.2d at 71. Nothing in § 302 modifies the term's plain meaning.

3. Finally, *Adcock* and *Sage* are unpersuasive because they require accepting the unbelievable proposition that employer assistance with organizing more members constitutes *nothing of any value* to unions, i.e., that it is utterly *worthless* and amounts to *nothing*.[13] This is untenable on its face. How can useful information, use of physical property, and control over communications be considered nonexistent? How can these things be worthless if UNITE and other unions aggressively demand them, provide consideration to obtain them, and use them to increase their membership ranks? To merely pose these questions is to answer them.

This case illustrates the point. UNITE spent over $100,000 on a political campaign to obtain organizing assistance from Mardi Gras. *Mulhall*, 618 F.3d at 1289. Delivery of this assistance will substantially increase UNITE's likelihood of unionizing Mardi Gras' employees. *Id.* at 1288-89. UNITE sued Mardi Gras when it did not provide the assistance as promised. *Id.* at 1285. Yet, to embrace the decisions in *Adcock* and *Sage*, one would have to believe that UNITE expended these resources in pursuit of nothing. It defies common sense.

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[13] *See Sage*, 390 F.3d at 218 ("The agreement here involves no payment, loan, or delivery *of anything*") (emphasis added); *Adcock*, 550 F.3d at 376 (same); *id.* at 374 (access to employees "do[es] not involve the delivery of either tangible or intangible items to the Union"); *id.* at 375 ("allowing the Union access to Freightliner's employees, ha[s] no such value whatsoever").

Amazingly, the Third and Fourth Circuits recognized that organizing agreements "serve the interests of . . . the Union," *Adcock*, 550 F.3d at 372, and "benefits" unions with "efficiency and cost saving," *Sage*, 390 F.3d at 218. Yet, the courts still held that organizing assistance is not a "thing of value . . . to any labor organization" under § 302(a)(2). The courts turned the plain meaning of the statute on its head by holding that something that is valuable to a union is not a "thing of value" to a union. These unpersuasive conclusions cannot be adopted.

II. Enforcing § 302 is Necessary to Fulfill Its Legislative Purpose

"Section 302 is a conflict-of-interest statute," whose "purpose is to protect employees in dealings between the union and employer . . . and specifically to protect them from the collusion of union officials and management." *Mulhall*, 618 F.3d at 1290 (internal citations omitted). This protection is provided because unions are empowered to act as the "exclusive representative" of employees vis-a-vis their employer. 29 U.S.C. § 159(a). Congress recognized that union receipt of anything of value from an employer conflicts with a union's duty to faithfully represent employees. *See United States v. Lanni*, 466 F.2d 1102, 1104-05 (3d Cir. 1972). "For centuries the law has forbidden any person in a position of trust to hold interests or enter into transactions in which self-interest may conflict with complete loyalty to those whom they serve." *Id.* at 1104 (quoting S. Rep. No.

86-187 (1959), reprinted 1959 U.S.C.C.A.N. 2318, 2330). For example, "a lawyer knows full well that he, representing a client, would not take a gift from the opposition." 92 Cong. Rec. 5428 (Sen. Hatch). Similarly here, unions are strictly prohibited from taking anything of value from the employers of employees they represent or seek to represent.

Mardi Gras assisting UNITE with becoming the exclusive representative of its employees for purposes of dealing with Mardi Gras is akin to choosing the attorney of an opposing party before litigation. The employer sits on both sides of the table. This collusive arrangement between UNITE and Mardi Gras is the very type of conflict of interest that § 302 exists to preclude.

The Eleventh Circuit recognized that "Mulhall's complaint . . . falls within the zone of interests that § 302 was designed to protect" because "the legislative history of § 302 demonstrates that the provision was intended to prohibit, among other things, the buying and selling of labor peace." *Id.* at 1290-91. Here, UNITE sold "labor peace" to Mardi Gras in exchange for its promises of organizing assistance. (Compl., ¶ 11). Indeed, Mardi Gras was able to induce UNITE to conduct a $100,000 political campaign with promises of this assistance. "Thing[s] of value" that assist union organizing are clearly as capable of influencing union conduct as cash payments from employers, and are thus within § 302's intended ambit.

Overall, "[l]egislative history confirms that a literal construction of [§ 302] does no violence to common sense." *Arroyo*, 359 U.S. at 424. "Judicial adherence to the intention of Congress in enacting § 302 requires strict enforcement of the purposefully rigid structure provided in the section." *Costello v. Lipsitz*, 547 F.2d 1267, 1272-73 (5th Cir. 1977).

III. Enforcing § 302 Against UNITE's Demands for Organizing Assistance Will Not Cause Any Absurd Results

UNITE claims that enforcing § 302 in this case will cause absurd results. This Circuit maintains an "exacting standard for finding absurdity." *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1228 (11th Cir. 2001). "[G]iving the words of a statute their plain and ordinary meaning [must] produce a result that is not just unwise but is clearly absurd." *Id.* The mere ability of a party to "craft a hypothetical that produces a result we might find anomalous is insufficient reason for disregarding the terms of the statute." *D'Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1238 (11th Cir. 2005). UNITE's "parade of horrors" do not come close to satisfying this exacting standard. In fact, absurd results will only occur if § 302 is not enforced as written against "thing[s] of value" for organizing.

A. *Labor Contracts Are Not Exempt from § 302's Prohibitions*

UNITE argues that § 302 cannot be enforce [sic] against the MOA because it – like all other "contracts between an employer and labor organization" – is enforceable under § 301 of the LMRA, 29 U.S.C. § 185. UNITE is thereby arguing that terms of labor contracts cannot be illegal because these contracts are enforceable instruments. This does not rise to level of sophistry.

Section 302 expressly applies to labor contracts between employers and unions, and is intended to invalidate noncompliant terms. Section 302(a) and (b) make it unlawful for employers and unions to "*agree*" to deliver or receive a "thing of value." 29 U.S.C. §§ 186(a) and (b). Terms of labor contracts, and arbitration awards arising from them, have been struck down under § 302 in this Circuit and others. *See, e.g., Costello,* 547 F.2d at 1278; *Bugher v. Cons. X-Ray Serv. Corp.*, 705 F.2d 1426, 1435 (5th Cir. 1983); *Jackson Purchase Rural Elec. Coop. Ass'n v. IBEW,* 646 F.2d 264, 267-68 (6th Cir. 1981).[14]

For example, collective bargaining agreements are certainly enforceable under § 301. Yet, "[t]he

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[14] The § 301 cases cited by UNITE are inapposite, as none addressed whether the contract's terms were lawful under § 302. This includes *Retail Clerks v. Lion Dry Goods,* 369 U.S. 17, 82 S. Ct. 541 (1962), which only addressed whether courts have jurisdiction under § 301 to enforce contracts other than collective bargaining agreements.

courts will not enforce an illegal collective bargaining agreement provision which [violates § 302]." *Bugher*, 705 F.2d at 1435; *see also NLRB v. BASF Wyandotte*, 798 F.2d 849, 854 (5th Cir. 1986). Under § 302, "the representatives of the employees, which means the union, shall not receive a tribute of this kind, even though it may be provided for in a collective bargaining contract." 92 Cong. Rec. 4893 (Sen. Byrd). Thus, it is no defense under § 302 that UNITE demands "thing[s] of value" pursuant to an organizing agreement with Mardi Gras.

A contrary result would eviscerate § 302. Unions and employers could violate § 302 at will by simply agreeing in a contract to engage in otherwise illegal transactions. Unions could accept cash payoffs from employers just as long as they put it in writing. Absurd results will only arise from this case if UNITE's legal theory is adopted.

B. *Enforcing § 302 as Written Against Organizing Assistance Will Protect the Integrity of Collective Bargaining*

UNITE hyperbolically asserts that enforcing § 302 will make "negate the very concept of collective bargaining." (UNITE Br., 9). To the contrary, enforcing § 302 will only protect collective bargaining from union self-dealing for organizing assistance.

Collective bargaining involves a union dealing with an employer solely as the fiduciary representative of its *employees* with respect to their terms of

employment. 29 U.S.C. § 158(d). This does not violate § 302(a) because collective bargaining agreements establish the wages and things that employers give to *their employees,* not their union representative. *See* 92 Cong. 4891 (Sen. Byrd) (Section 302(a) "does not prohibit the employee himself from accepting money or other things of value if it is directly paid to the employee by the employer"). Section § 302(c) exempts those few employee benefits that also result in the delivery of something to the employees' union representative, such as trust fund contributions. *See* 29 U.S.C. § 186(c).

In sharp contrast to legitimate collective bargaining, here UNITE is demanding things of value from Mardi Gras solely *for itself,* and not for employees it represents. This union self-dealing is antithetical to the collective bargaining process, as it creates a conflict of interest between the union and the employees it represents or seeks to represent. Congress strictly prohibited unions from receiving anything of value from employers in § 302(a), save as permitted by § 302(c), to prevent such collusion between unions and employers. Thus, far from imperiling collective bargaining, enforcing § 302 as written in this case is necessary to protect the integrity of the process from union-self dealing with employers for their organizing interests.

C. *Enforcing § 302 Will Not Force Employers to Speak Against Unions*

UNITE absurdly claims that, if § 302 is enforced against the gag-clause, "an employer's silence on the issue of unionization during a union's organizing drive, even in the absence of an agreement, could constitute the 'delivery' of a 'thing of value' to a union – and hence land this employer in jail." (UNITE Br., 10). This is false because nothing is "delivered" to a union under § 302(a) when an employer *unilaterally* remains silent absent an agreement with the union. Only when an employer grants a union control over its speech by virtue of a gag-clause agreement is a "thing of value" delivered to the union in violation of § 302(a). It is the control over Mardi Gras communications – not the speech itself – that is the "thing of value."

The gag-clause is akin to a non-competition agreement. Of course, Mardi Gras does not deliver something to its competitors every time it unilaterally chooses to not compete with them. But, Mardi Gras will deliver something of great value to its competitors if it enters into a noncompetition agreement with them, namely, it will deliver control over Mardi Gras actions. *Cf. United States v. Gotti*, 459 F.3d 296, 323 (2d Cir. 2006) ("intangible property rights – such as . . . non-competition or exclusivity agreements – are certainly things of value that are capable of being exercised, transferred, or sold"). The same is true here with respect to Mardi Gras' noncompetition agreement with UNITE (i.e., the gag-clause).

Moreover, UNITE's claim that striking down the gag-clause will impair employer free speech turns reality on its head. Striking down the gag-clause can only facilitate free speech by removing this restriction on Mardi Gras' speech, freeing the company to speak as it desires. It is UNITE that seeks to squelch Mardi Gras' speech rights in this case, not Mulhall.

D. *Enforcing § 302 as Written Is Consistent with the NLRA*

1. UNITE argues that enforcing § 302 will conflict with the National Labor Relations Act ("NLRA") because UNITE's conduct supposedly does not violate § 8 of the NLRA, 29 U.S.C. § 158.[15] But Mulhall does not have to prove a violation of the NLRA to establish a violation of § 302. The mere possibility that the "two statutes produce differing results when applied to the same factual situation" does not justify not enforcing one of the statutes. *United States v. Batchelder*, 442 U.S. 114, 122 (1979). "Both § 302 of LMRA and § 8 of the NLRA may make similar conduct unlawful, but each provides an independent remedy." *Hospital Employees' Div. of Local*

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[15] Contrary to UNITE's claim, employer delivery of organizing assistance to unions can violate the NLRA depending on the circumstances. *See, e.g., Duane Reade, Inc.*, 338 N.L.R.B. 943, 943-44 (2003); *Kosher Plaza Super Market*, 313 N.L.R.B. 74, 84 (1993); *cf.*, Charles I. Cohen et al., *Resisting Its Own Obsolescence-How the NLRB Is Questioning the Existing Law of Neutrality Agreements*, 20 Notre Dame J.L. Ethics & Pub. Pol'y 521 (2006).

79, *SEIU v. Mercy-Mem. Hosp.*, 862 F.2d 606, 608 (6th Cir. 1988);[16] *cf. Int'l Longshoremen & Warehousemen's Union v. Juneau Spruce Corp*, 342 U.S. 237, 244 (1952) (remedies of § 303 of the LMRA independent of the NLRA). Thus, as the Sixth Circuit held in *Mercy-Memorial Hospital*, § 302 can [sic] enforced against conduct lawful under § 8 of NLRA. 862 F.2d at 608. Indeed, a contrary conclusion would "effectively repeal § 302 because the conduct proscribed by § 302 is almost always arguably subject to §§ 7 or 8 of the NLRA." *Id.*

There is certainly nothing in the NLRA that gives UNITE any affirmative *right* to receive information, property, or a gag-clause from Mardi Gras. *See Lechmere v. NLRB*, 502 U.S. 527, 532-34 (1992) (unions have no right to use employer property); 29 U.S.C. § 158(c) (employers may engage in non-coercive speech about unionization); *Always Care Home Health Serv.*, 1998 WL 2001253 (NLRB GG 1998) (unions have no right to information about nonunion employees). Accordingly, enforcing § 302 with respect to organizing assistance cannot possibly conflict with the NLRA. "[S]o long as there is no positive repugnancy between two laws, a court must give effect to both." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992).

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[16] *Further proceedings*, 492 U.S. 914 (*judgment vacated on other grounds*), *on remand*, 881 F.2d 1076 (6th Cir. 1989) (table) (reinstating § 302 ruling).

2. Far from causing absurd results, enforcing § 302 will serve only to protect the NLRA's organizing procedures from UNITE's attempt to supplant them with a private agreement. "By its plain terms . . . the NLRA confers rights only on employees, not on unions or their nonemployee organizers." *Lechmere*, 502 U.S. at 532. To effectuate employee free choice, the NLRA favors secret-ballot elections under § 9(a) of the Act, 29 U.S.C. § 159(a), and an "uninhibited, robust, and wide-open debate" about unionization under § 8(c) of the Act, 29 U.S.C. § 158(c), *Chamber of Commerce v. Brown*, 554 U.S. 60, 68 (2008). By contrast, the NLRA does not grant unions any right to employer assistance with organizing. *See, e.g., Lechmere*, 502 U.S. at 532-34.

The MOA turns the NLRA on its head. It prohibits Mardi Gras from petitioning for a secret-ballot election under § 9 of the NLRA. (MOA, ¶ 9). The MOA's gag-clause squelches the free speech favored under § 8(c) of the Act. (*Id.* at ¶ 4). The MOA even prohibits filing of charges with the NLRB under § 8 of the NLRA to remedy violations of employee rights. (*Id.* at ¶ 9). These employee protections are replaced with employer-provided organizing assistance for UNITE. The NLRA's "bottom-up" organizing process is upended into a "top-down" process.

Congress prohibited such top-down organizing in § 302 by prohibiting employers from delivering any "thing of value" to: (1) "any labor organization" that "*seeks to represent*, or would admit to membership, any of the employees of such employer," 29 U.S.C.

§ 186(a)(2); and, (2) an "employee or group or committee . . . to influence any other employees in the exercise of the *right to organize* and bargaining collectively through representative of their own choosing." 29 U.S.C. § 186(a)(3) (emphasis added). In these unmistakable terms, Congress prohibits unions from demanding anything of value from employers of employees they seek to organize.

For these reasons, enforcing § 302 against "thing[s] of value" useful for organizing causes no absurd results. It only effectuates the purposes of § 302 and protects the NLRA's organizing and bargaining procedures from top-down union organizing schemes.

CONCLUSION

For the foregoing reasons, UNITE's motion to dismiss must be denied.

Dated: 17 December 2010
Boca Raton, Florida

Respectfully submitted,

/s/ Daniel R. Levine

DANIEL R. LEVINE, ESQ.
Florida Bar No. 0057861
Email:
drlevine@sbwlawfirm.com
SHAPIRO, BLASI,
WASSERMAN, &
GORA, P.A.
7777 Glades Road,
Suite 400
Boca Raton, Florida 33434
Telephone: (561) 477-7800
Facsimile: (561) 477-7722
Co-counsel for Plaintiff

William L. Messenger
Virginia Bar No. 47179
(Pro Hac Vice)
E-mail: wlm@nrtw.org
c/o National Right to
Work Legal Defense
Foundation
8001 Braddock Road,
Suite 600
Springfield, Virginia 22160
Telephone: (703) 321-8510
Facsimile: (703) 321-9319
Co-counsel for Plaintiff

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No. 11-10594-F

In the
United States Court of Appeals
For the Eleventh Circuit

MARTIN MULHALL,
Plaintiff-Appellant,

v.

UNITE HERE LOCAL 355 and
HOLLYWOOD GREYHOUND TRACK, INC.
d/b/a MARDI GRAS GAMING,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA District Court No. 08-CV-61766-PAS
Hon. Patricia A. Seitz, United States District Judge

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF REHEARING EN BANC

(Filed Apr. 12, 2012)

M. PATRICIA SMITH
Solicitor of Labor

DEBORAH GREENFIELD
Deputy Solicitor

LANNY A. BREUER
Assistant Attorney General

JOHN D. BURETTA
Acting Deputy Assistant
Attorney General

STEVEN MANDEL
Deputy Solicitor for
National Operations

JOHN J. SULLIVAN
Senior Counsel to
the Solicitor
U.S. Department of Labor
LAFE E. SOLOMON
Acting General Counsel
National Labor
Relations Board

JOHN M. PELLETTIERI
Attorney, Appellate Section
Criminal Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D C. 20530
(202) 307-3766

CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir. R. 26.1-1, the undersigned certifies that he believes the Certificate of Interested Persons filed by Appellant is complete, with the addition of the following persons that have or may have an interest in the outcome of this appeal:

Breuer, Lanny A.

Buretta, John D.

Greenfield, Deborah

Mandel, Steven

Pellettieri, John M.

Smith, M. Patricia

Solomon, Lafe E.

Sullivan, John J.

/s/John M. Pellettieri
JOHN M. PELLETTIERI
Attorney, Appellate Section
Criminal Division
U.S. Department of Justice

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following question of exceptional importance: whether the court, contrary to the Third Circuit's decision in *Hotel Emps. & Rest. Emps. Union, Local 57 v. Sage Hospitality Res.*, 390 F.3d 206 (2004), *cert. denied*, 544 U.S. 1010 (2005), and the Fourth Circuit's decision in *Adcock v. Freightliner*, 550 F.3d 369 (2008), *cert. denied*, 130 S. Ct. 62 (2009), erroneously concluded that providing and seeking organizing assistance in accordance with a voluntary recognition agreement may violate Section 302 of the Labor Management Relations Act, 29 U.S.C. § 186, depending on the subjective intent of the union and employer in entering into that agreement.

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to *United States v. Phillips*, 19 F.3d 1565 (11th Cir. 1994), *cert. denied sub. nom. USX Corp v. United States*, 115 S. Ct. 1312 (1995).

/s/John M. Pellettieri
JOHN M. PELLETTIERI
Attorney, Appellate Section
Criminal Division
U.S. Department of Justice

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[1] STATEMENT OF THE ISSUE MERITING EN BANC CONSIDERATION

Whether a voluntary recognition agreement between an employer and union that contains common and well-recognized ground rules for the conduct of a union organizing campaign may violate Section 302 of the Labor Management Relations Act, 29 U.S.C. § 186, based on whether the employer "offer[ed] organizing assistance with the intention of improperly influencing [the] union." *Mulhall v. UNITE HERE Local 355*, 667 F.3d 1211, 1215 (11th Cir. 2012).

BACKGROUND AND PROCEDURAL HISTORY

1. Defendant UNITE HERE Local 355 is a union that seeks to represent the employees of defendant Mardi Gras, a company running a gaming business in Florida. District Ct. Docket Entry 1 (Complaint), at ¶¶ 4-5. In 2004, Mardi Gras and UNITE HERE entered into a Memorandum of Agreement in which Mardi Gras agreed to recognize the union as the collective bargaining representative of its employees once the union presented evidence that it had the support of a majority of affected employees. In particular, Mardi Gras agreed to abide by the results of a "card check" procedure rather than insist upon an election process overseen by the National Labor Relations Board (NLRB). District Ct. Docket Entry 1, Ex. A [2] (Agreement), at ¶ 9. Mardi Gras also agreed to provide the union lists of employees, with names and addresses; to allow the union access to Mardi Gras premises and employees; and to remain neutral during the union's organizing campaign. *Id.* at ¶¶ 4, 7 & 8. In return, the union agreed not to "engage in a strike, picketing or other economic activity" at a Mardi Gras facility during the organizing campaign. *Id.* at ¶ 11. The complaint alleged that the union also promised to support a ballot initiative that would allow Mardi Gras to install slot machines at its facilities. *Id.*

The Agreement specified that it would not go into effect until a slot machine was installed at a Mardi Gras gaming facility. *Id.* at ¶ 15. After entering into the Agreement, UNITE HERE supported a Florida

ballot initiative that would allow Mardi Gras to install the machines, spending over $100,000 to campaign for the initiative. The initiative passed, Mardi Gras installed the machines, and UNITE HERE requested that Mardi Gras comply with the terms of the agreement. *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1283-85 (11th Cir. 2010) ("*Mulhall I*"). Mardi Gras refused to do so, and the union successfully sought to enforce the Agreement through arbitration. *Id.* at 1285.

2. Plaintiff Martin Mulhall, a Mardi Gras employee, filed suit to prevent enforcement of the agreement. Complaint ¶ 6. He contended that if [3] Mardi Gras were to provide the union with employee lists, grant the union access to its facilities, and remain neutral during the union's organizing campaign, the company would violate Section 302(a)(2) of the Labor Management Relations Act, which makes it unlawful for an employer "to pay, lend, or deliver . . . any money or other thing of value . . . to any labor organization . . . which represents, seeks to represent, or would admit to membership, any of the employees of such employer." 29 U.S.C. § 186(a)(2); Complaint ¶ 36. He further contended that UNITE HERE'S requests for the employee lists, access, and neutrality violated Section 302(b), which makes it unlawful to "request, demand, receive, or accept . . . any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a)." 29 U.S.C. § 186(b)(1).

After the district court dismissed Mulhall's complaint for lack of standing, this Court reversed,

Mulhall I, 618 F.3d at 1286-90.[1] On remand, the district court dismissed the complaint for failure to allege a violation of Section 302. District Court Docket Entry 49 (Order). Relying on *Adcock v. Freightliner*, 550 F.3d 369 (4th Cir. 2008), *cert. denied*, 130 S. Ct. 62 (2009), and *Hotel Emps. & Rest. Emps. Union, Local 57 v. Sage Hospitality Res.*, 390 [4] F.3d 206 (3d Cir. 2004), *cert. denied*, 544 U.S. 1010 (2005), the court held that providing employee lists, facility access, and neutrality does not constitute "delivery" of a prohibited "thing of value" for purposes of Section 302. The court explained that the purpose of Section 302 is to prevent corruption of union officers and found that "[t]here is no indication of" such corruption in this case. Order at 5.[2]

3. A divided panel of this Court reversed. *Mulhall v. UNITE HERE Local 355*, 667 F.3d 1211 (11th Cir. 2012) ("*Mulhall II*"). As an initial matter, the majority noted that the phrase "thing of value" encompasses both tangibles and intangibles. *Id.* at 1214-15. While "intangible organizing assistance cannot be loaned or delivered" for purposes of Section 302, the Court determined, it can constitute a "payment" under the statute if "its performance fulfills an obligation." *Id.* at 1215.

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[1] The Court declined to address whether Section 302 establishes a private right of action or whether Mulhall's complaint alleged a viable claim under Section 302. *Id.* at 1293-94.

[2] Because the court concluded that the complaint failed to state a claim, it declined to address whether a private right of action exists under Section 302. Order at 3 n.1.

The majority distinguished, however, a proper payment of organizing assistance from a payment that is "improper" and violates Section 302. "Employers and unions may set ground rules for an organizing campaign, even if the employer and union benefit from the agreement," the Court concluded, "[b]ut innocuous ground rules can become illegal payments if used [5] in a scheme to corrupt a union or to extort a benefit from an employer." *Id.* at 1215. The relevant factor, according to the majority, is whether an employer "offer[s] organizing assistance with the intention of improperly influencing a union." *Id.* The Court determined that "Mulhall has stated a claim for relief' and "remand[ed] so that the district court can consider the § 302 claim and determine the reason why Unite and Mardi Gras agreed to cooperate with one another." *Id.* at 1216-17.

Judge Restani dissented. She would have affirmed under the reasoning of the Third and Fourth Circuits in *Sage* and *Adcock*. *Id.* at 1216. She also found that the majority's creation of an intent element is inconsistent with the statute's purpose of promoting "labor peace and collective bargaining." *Id.* at 1216-17. Judge Restani explained that the Labor Management Relations Act "cannot promote collective bargaining and, at the same time, penalize unions" that are seeking to obtain collective bargaining rights through voluntary recognition and peaceful resolution of labor disputes. *Id.* at 1217. Judge Restani also concluded that Mulhall's complaint fails even under the standard adopted by the majority, because the

"complaint makes no allegations of wrongdoing relating to the formation of the Agreement or Unite's motives at the time of contracting" but "merely alleges that unions, in general, have or may have improper motives when negotiating these concessions." *Id.* at 1217.

[6] REASONS FOR GRANTING THE PETITION

The panel's interpretation of Section 302 is erroneous and inconsistent with decisions of the Third and Fourth Circuits interpreting the statute in similar circumstances. Section 302 is intended to root out bribery and extortion, not to police agreements that facilitate voluntary union recognition. In importing an intent element into Section 302(a)(2), the panel departed from the statutory text and adopted a standard that conflicts with this Court's precedent. The panel's decision has the potential to significantly burden union-employer labor relations and to intrude upon the primary jurisdiction of the NLRB. Potential civil and criminal liability, not to mention the specter of drawn-out discovery, is likely to dissuade employers and unions from entering into voluntary recognition agreements, and to upset the careful balance struck by the NLRB on labor-management issues.

I. The Panel Adopted an Erroneous Interpretation of Section 302 That Conflicts With Decisions of the Third and Fourth Circuits

This Court should grant the petition for rehearing to conform to the decisions of the Third and Fourth Circuits in *Adcock v. Freightliner*, 550 F.3d 369 (4th Cir. 2008), *cert. denied*, 130 S. Ct. 62 (2009), and *Hotel Emps. & Rest. Emps. Union, Local 57 v. Sage Hospitality Res.*, 390 F.3d 206 (3d Cir. 2004), *cert. denied*, 544 U.S. 1010 (2005). In those cases, the courts correctly [7] rejected Section 302 challenges to recognition agreements containing organizing ground rules similar to those at issue here.

In *Sage*, an employer (Sage) entered into an agreement with a union in which it agreed that union representation would be determined using a card-check procedure and that disputes under the agreement would be settled using arbitration. 390 F.3d at 209. The court of appeals concluded that Sage did not provide a prohibited thing of value to the union, in violation of Section 302. *Id.* at 218-19. The court found no "legal support for the remarkable assertion that entering into a valid labor agreement governing recognition of a labor union amounts to illegal labor bribery." *Id.* at 219.

In *Adcock*, an employer (Freightliner) agreed to abide by the results of a card-check procedure instead of insisting on an NLRB election, to require employees to attend a presentation about the card-check procedure, to allow the union access to Freightliner

facilities, and to refrain from making negative comments about the union. 550 F.3d at 371. The court of appeals concluded that Freightliner did not provide a prohibited thing of value to the union in violation of Section 302. *Id.* at 374-75. The court emphasized that "[b]y no stretch of the imagination" were the concessions made by Freightliner "a means of bribing representatives of the Union." *Id.* at 375. "Rather," the court [8] explained, "the concessions serve the interests of both Freightliner and the Union, as they eliminate the potential for hostile organizing campaigns in the workplace." *Id.*[3]

Sage and *Adcock* were correctly decided. Voluntary recognition agreements, which typically include promises like those at issue here, are a common feature of labor relations. Congress did not intend to prohibit or impede such agreements through Section 302.

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[3] In a separate agreement, the union agreed to certain bargaining concessions in the event that it was recognized as the exclusive bargaining representative of Freightliner's employees. *Id.* at 372. The court concluded that these concessions did not run afoul of Section 302, because "§ 302 only prevents employers from delivering (and the union or union representatives from accepting or receiving) 'thing[s] of value.'" *Adcock*, 550 F.3d at 376. The court noted that adequate remedies are available under the National Labor Relations Act to challenge any unlawful aspects of such agreements, and in fact the NLRB filed and settled charged of unfair labor practices against the union. *Id.* at 373, 376-77.

As an initial matter, voluntary recognition agreements have been an integral part of federal labor law since long before the enactment of Section 302. Voluntary recognition "predates the National Labor Relations Act and is undisputedly lawful under it." *Lamons Gasket Co.*, 357 N.L.R.B. No. 72, 2011 WL 3916075, at *4-*5 (2011) (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 598 (1969)); *see United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 72 n.8 (1956) (recognizing that an NLRB "election is not the only [9] method by which an employer may satisfy itself as to the union's majority status"). In 1947, when Congress enacted Section 302, it rejected an amendment to the National Labor Relations Act (NLRA) that would have made the employer's duty to bargain enforceable only where the union had demonstrated its majority status through an NLRB election. *See NLRB v. Gissel Packing*, 395 U.S. at 598. It would be incongruous for Congress to approve voluntary recognition but to impede it by prohibiting agreements laying out ground rules through Section 302.

In addition, courts have repeatedly enforced negotiated ground-rules agreements under Section 301 of the LMRA, 29 U.S.C. § 185, *see, e.g., Hotel & Rest. Emps. Union Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561, 563 (2d Cir. 1993); *Hotel Emps., Rest. Emps. Union, Local 2 v. Marriott*, 961 F.2d 1464, 1467-68 (9th Cir. 1992); *ACTWU v. Facetglas*, 845 F.2d 1250, 1252 (4th Cir. 1988), and the NLRB has upheld these recognition and ground-rules agreements

as permissible under the NLRA, *see, e.g., MGM Grand Hotel, Inc.* 329 N.L.R.B. 464, 466 (1999); *Cam Indus.*, 251 N.L.R.B. 11 (1980), *enforced NLRB v. Cam Indus.*, 666 F.2d 411, 412-13 (9th Cir. 1982); *Snow and Sons*, 134 N.L.R.B. 709 (1961), *enforced* 308 F.2d 687 (9th Cir. 1962). Congress has [10] amended Section 302 numerous times,[4] but it never has suggested that Section 302 criminalizes long-recognized and commonplace voluntary recognition agreements.

The legislative history of Section 302 further supports this conclusion. Congress enacted Section 302 in 1947 "to prevent employers from tampering with the loyalty of union officials, and disloyal union officials from levying tribute upon employers." *United States v. Roth*, 333 F.2d 450, 453 (2d Cir. 1963) (internal citation and quotation marks omitted). At the same time, Congress amended the NLRA to add Section 8(b), 29 U.S.C. § 158(b), to regulate for the first time unfair labor practices by unions. Section 8(b) permits agreements that provide valuable benefits to unions, such as union security agreements making the payment of union membership dues a condition of employment, *Radio Officers Union v. NLRB*, 347 U.S.

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[4] *See* Oct. 14, 1969, Pub. L. 91-86, 83 Stat. 133; Aug. 15, 1973, Pub. L. 93-95, 87 Stat. 314; Oct. 27, 1978, Pub. L. 95-524, § 6(d), 92 Stat. 2021; Oct. 12, 1984, Pub. L. 98-473, Title II, § 801, 98 Stat. 2131; Apr. 18, 1990, Pub. L. 101-273, § 1, 104 Stat. 138; Pub. L. 104-88, Title III, § 337, Dec. 29, 1995, 109 Stat. 954.

17, 39-42 (1954), and agreements making union-run hiring halls the exclusive source of hiring referrals, *Local 357 Teamsters v. NLRB*, 365 U.S. 667, 675-76 (1961). With respect to the question whether agreements allowing union access to the [11] employer's property constituted unlawful assistance, Congress's concern was that employers should grant access to unions on a non-discriminatory basis. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 40-41 (1947); *see* 29 U.S.C. §§ 159(c)(2) & 160(c). It is implausible that the same Congress that permitted agreements that provided valuable benefits to unions (e.g., union security and exclusive hiring-hall agreements) and enhanced union workplace access also intended to criminalize voluntary recognition agreements under Section 302.

In 1959, in light of *Ventimiglia v. United States*, 242 F.2d 620 (4th Cir. 1957), a decision overturning a conviction under Section 302 because a union official was not a "representative" of employees at the time he accepted payments from an employer, Congress extended the statute to encompass "any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of the employer." There is no evidence that this change was intended to sweep in run-of-the-mill voluntary recognition agreements. To the contrary, Representative McGovern explained:

> Who could honestly read into this provision a prohibition of the check-off, or who could imagine its forbidding the conduct of normal

> and legitimate labor relations? No, clearly this provision prohibits improper payments to union officials, employees, or middlemen – in a word, it forbids bribes or pay-offs. To read it [12] otherwise is to distort the intent of the drafters and the legislative history of this provision.

Congressional Record, Labor-Management Reporting and Disclosure Act of 1959, Remarks of Rep. McGovern on S. 3974, pp. 15097-15098 (Aug. 6, 1958).

II. The Panel Decision Misconstrues Section 302 By Adding a Specific Intent Element That Does Not Appear in the Statute

The panel remanded this case for the district court to "determine the reason why Unite and Mardi Gras agreed to cooperate with one another." 667 F.3d at 1216-17. That was error; as this Court has recognized, the statutory provisions at issue do not contain such a specific intent requirement.

Section 302(d) contains the *mens rea* requirement for offenses under Section 302(a)(2) and Section 302(b)(1). That subsection states that any person who "willfully violates" those provisions shall be guilty of a felony. 29 U.S.C. § 186(d). The statutory provisions at issue, Section 302(a)(2) and Section 302(b)(1), do not contain an additional specific intent requirement. In contrast, other provisions do require a specific intent to influence the recipient. For example, Section 302(a)(4) makes it unlawful for an employer to pay any money or any other thing of value to an officer of

a labor organization "with intent to influence him in respect to any of his actions, decisions, or duties" as an officer of the labor organization. 29 U.S.C. § 186(a)(4). Other statutes that [13] proscribe giving a thing of value to another likewise specifically require an intent to influence the recipient. *See, e.g.*, 18 U.S.C. § 201(b)(1) (requiring intent to influence a public official in bribery statute). Thus, when Congress wants to make the legality of giving a thing of value contingent on an individual's intent to influence the recipient, it knows how to do so.

This Court recognized as much in *United States v. Phillips*, 19 F.3d 1565 (11th Cir. 1994), *cert. denied sub. nom., USX Corp v. United States*, 115 S. Ct. 1312 (1995). In that case, the Court explained that Section 302(d)'s requirement of a willful violation "require[s] a finding only of general intent," not the specific intent to influence. 19 F.3d at 1581-82. Because Sections 302(a)(1) and (a)(2) contain no specific intent requirement, the Court explained that "Congress must have intended [those sections] to prohibit payments to representatives even if they were made without any intent to influence." *Id.* at 1580-81. The panel was therefore mistaken in suggesting that such intent could "transform an otherwise 'innocuous' concession into a bribe or constitute extortion in violation of" Sections 302(a)(2) and (b)(1). *Mulhall II*, 667 F.3d at 1216 (Restani, J., dissenting).

[14] **III. The Panel Decision Intrudes Into the Domain of the NLRB and Discourages Employers and Unions from Entering into Lawful Labor Agreements**

The panel decision creates a vehicle for private parties to bring directly to court voluntary recognition agreement disputes within the NLRB's primary jurisdiction and threatens to saddle employers and unions with costly and drawn out discovery aimed at uncovering evidence of improper intent.[5] Not only would this allow private parties to intrude into the traditional domain of the NLRB, but it provides a disincentive to employers and unions to enter into agreements that are undoubtedly legal and that promote labor peace and collective bargaining.

Since 1947, disputes under the NLRA concerning the lawfulness of recognition and ground-rules agreements have been adjudicated by the NLRB, the expert agency entrusted to interpret and enforce that statute. As the Third Circuit concluded in *Sage*, injecting the criminal provisions of Section 302 into this arena could "wreak havoc on the carefully balanced structure of the laws governing recognition of and bargaining with unions." *Id.* That is precisely [15] what the panel decision threatens to do. The possibility of liability under Section 302, even the

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[5] To be sure, the panel decision is interlocutory, and the district court could dismiss the complaint on remand. The district court has not ruled on the claim that Section 302 does not create a private right of action, for example, and the court could dismiss the complaint on those grounds.

possibility of costly litigation and discovery, is likely to discourage conduct that is not only lawful, but often protected under the NLRA, upsetting the careful policy balance wrought by the NLRB over the years to shape conduct in this core area of labor-management relations.

CONCLUSION

The petition for rehearing en banc should be granted.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

DEBORAH GREENFIELD
Deputy Solicitor

STEVEN MANDEL
Deputy Solicitor for
National Operations

JOHN J. SULLIVAN
Senior Counsel to
the Solicitor
U.S. Department of Labor

LAFE E. SOLOMON
Acting General Counsel
National Labor
Relations Board

LANNY A. BREUER
Assistant Attorney General

JOHN D. BURETTA
Acting Deputy Assistant
Attorney General

/s/John M. Pellettieri
JOHN M. PELLETTIERI
Attorney, Appellate Section
Criminal Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
(202) 307-3766

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PETITIONER'S BRIEF

RECORD
AND
BRIEFS

No. 12-99

In The

Supreme Court of the United States

UNITE HERE LOCAL 355,

Petitioner,

vs.

MARTIN MULHALL; HOLLYWOOD GREYHOUND TRACK, INC. d/b/a MARDI GRAS GAMING,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S BRIEF

RICHARD G. MCCRACKEN
Counsel of Record
ANDREW J. KAHN
PAUL L. MORE
DAVIS, COWELL & BOWE LLP
595 Market Street, Suite 1400
San Francisco, CA 94105
Telephone: (415) 597-7200
rmccracken@dcbsf.com

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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QUESTION PRESENTED

Section 302 of the Labor Management Relations Act, 29 U.S.C. § 186 – the federal labor anti-bribery statute – makes it criminal for an employer "to pay, lend, or deliver . . . any money or other thing of value" to a labor union that seeks to represent its employees, and prohibits the labor union from receiving the same. The Third and Fourth Circuits have held that agreements between employers and unions that set ground rules for union organizing campaigns – including employer promises to remain neutral and recognize the union upon a showing of majority support, and union promises to forego the rights to picket, boycott, or otherwise put pressure on the employer's business – are not "payment" or "delivery" of "things of value" proscribed by § 302. The Third Circuit found that a contrary holding would "wreak havoc on the carefully balanced structure of the laws governing recognition of and bargaining with unions." *Hotel Employees & Restaurant Employees, Local 57 v. Sage Hospitality Resources, LLC*, 390 F.3d 206, 219 (3d Cir. 2004) ("*Sage*"), *cert. denied*, 544 U.S. 1010 (2005). In this case, however, the Eleventh Circuit came to the opposite conclusion. The question presented is:

Whether an employer and union may violate § 302 by entering into an agreement under which the employer exercises its freedom of speech by promising to remain neutral to union organizing, its property rights by granting union representatives limited

QUESTION PRESENTED – Continued

access to the employer's property and employees, and its freedom of contract by obtaining the union's promise to forego its rights to picket, boycott, or otherwise put pressure on the employer's business.

LIST OF PARTIES AND CORPORATIONS

The parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit were Petitioner UNITE HERE Local 355 (the "union"), Respondent Martin Mulhall, and Co-defendant Hollywood Greyhound Track, Inc. d/b/a Mardi Gras Gaming ("Mardi Gras" or the "employer"). The United States Department of Justice; United States Department of Labor; the National Labor Relations Board; the American Federation of Labor and Congress of Industrial Organizations; Change to Win; Communications Workers of America; International Brotherhood of Teamsters; Service Employees International Union; United Automobile Workers; United Food and Commercial Workers International Union; United Steel Workers; and National Federation of Independent Business Small Business Legal Centers appeared as *amici curiae* in the Court of Appeals.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit below is reported as *Mulhall v. UNITE HERE Local 355 et al.*, 667 F.3d 1211 (11th Cir. 2012) ("*Mulhall II*"). Pet. App. 1-12.[1] A previous appellate decision is reported as *Mulhall v. UNITE HERE Local 355 et al.*, 618 F.3d 1279 (11th Cir. 2010) ("*Mulhall I*"). Pet. App. 34-60. The order denying the petition for rehearing and for rehearing *en banc*, Pet. App. 61-62, is not reported. The opinions of the district court, Pet. App. 13-23 and Pet. App. 24-33, are not reported.

JURISDICTION

The Court of Appeals entered its judgment on January 18, 2012. Pet. App. 1. It denied the union's petition for rehearing on April 25, 2012. Pet. App. 61-62. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[1] In this brief, references to materials contained in the appendix to the petition for writ of *certiorari* are designated "Pet. App." References to materials contained in the Joint Appendix filed herewith are designated "J.A."

STATUTORY PROVISION INVOLVED

Section 302 of the Labor Management Relations Act of 1947 ("LMRA" or "Taft-Hartley amendments"), as amended and codified at 29 U.S.C. § 186, provides in relevant part:

> § 186. Restrictions on financial transactions.
>
> (a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations
>
> It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value –
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce;
>
> (3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any

other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) Request, demand, etc., for money or other thing of value

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

. . .

(c) Exceptions [omitted].

Section 302, 29 U.S.C. § 186, is set forth in its entirely in the Statutory Appendix.

STATEMENT OF THE CASE

The Eleventh Circuit became the first court since Congress enacted the LMRA in 1947 to hold that an agreement between an employer and a union setting ground rules for organizing – including promises by the employer to remain neutral toward union representation, to let the union onto its property to talk to

employees, and to give the union employees' names and addresses, and promises by the union to forego its rights to picket, boycott or otherwise put pressure on the employer's business – may violate § 302. The theory has been pressed on two other circuit courts, both of which have rejected it soundly. *Adcock v. Freightliner LLC*, 550 F.3d 369, 374-376 (4th Cir. 2008); *Sage*, 390 F.3d at 218-219. This Court and the courts of appeals have unanimously and for decades enforced agreements of the sort at issue here. Only now, 65 years after the passage of the Taft-Hartley amendments to the National Labor Relations Act, 29 U.S.C. §§ 151-169 ("NLRA"), has the propriety of this important part of cooperative labor-management relations been put in doubt.

In 2004, Mardi Gras and the union entered into a Memorandum of Understanding (the "neutrality agreement"), covering any licensed gaming facility in Miami-Dade or Broward county owned or operated by Mardi Gras. Pet. App. 78-86. The neutrality agreement required Mardi Gras to voluntarily recognize the union as the representative of its employees if a majority of them gave written authorizations to the union to be their agent. Pet. App. 81-82, ¶ 9. It also provided that if the union conducted an organizing campaign among the employees, Mardi Gras would remain neutral and would not express any opposition to its employees' selection of an exclusive representative, or preference for any particular union. Pet. App. 79, ¶ 4. Mardi Gras promised to allow the union to communicate with its employees by letting union

representatives engage in organizing efforts in non-public areas of its facility during employees' non-work times. Pet. App. 80, ¶ 7. Mardi Gras also agreed to share information about its employees' job classifications, names, and addresses. Pet. App. 81, ¶ 8. In return, the union promised not to strike, picket, or engage in other economic action against Mardi Gras while the neutrality agreement was in effect. Pet. App. 82, ¶ 11.

The neutrality agreement contains other provisions benefiting Mardi Gras and the union. The parties agreed that "any disputes over the interpretation or application of this Agreement shall be submitted to expedited and binding arbitration" by an arbitrator jointly chosen from a panel provided by the American Arbitration Association. Pet. App. 84, ¶ 14. The parties chose arbitration as the exclusive means to resolve their disputes during any organizing drive. Pet. App. 81-82, ¶ 9. In addition, Mardi Gras agreed to notify the Union if it had job vacancies and to permit the Union to refer applicants, with Mardi Gras remaining "the sole judge of an applicant's suitability[.]" Pet. App. 79-80, ¶ 6. The parties further agreed that the neutrality agreement would not take effect unless Mardi Gras installed "slot machines, Video Lottery Terminals or similar gaming devices" at the covered facility. Pet. App. 85, ¶ 15.

The union supported a successful Florida ballot initiative that authorized legalization of slot machines in Miami-Dade and Broward counties. Pet. App. 38; *see* FLORIDA CONST., Art. X, Section 23. The

neutrality agreement at issue here was one of many negotiated between the union and a consortium of race-track owners, in anticipation of expanded gaming in these counties. J.A. 55. After the initiative passed, Mardi Gras installed slot machines at the Hollywood Greyhound Track and opened them to the public in 2006. The union notified Mardi Gras of its intent to organize the facility's employees, and Mardi Gras provided the union its employees' names and addresses in 2006 and 2007. Pet. App. 14. In 2008, however, Mardi Gras refused to provide any further information or to arbitrate its breach of the neutrality agreement. Pet. App. 14-15. In response to the union's petition to compel arbitration, Mardi Gras argued that the agreement was void under § 302(a)(2) because Mardi Gras had promised to pay things of value to the union in it. *Id.* The district court held that because Mardi Gras did not challenge the legality of the neutrality agreement's arbitration clause specifically, the issue of legality was for the arbitrator in the first instance. *UNITE HERE Local 355 v. Hollywood Greyhound Track, Inc.*, No. 08-cv-61655-PAS (S.D. Fla. April 16, 2009), Order Granting Motion to Compel Arbitration, at 3.[2]

A few weeks after Mardi Gras challenged the agreement, Respondent Martin Mulhall brought this

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[2] An arbitrator subsequently held that that the neutrality agreement was legal under § 302 and ordered Mardi Gras to comply with it. J.A. 44-64. A district court confirmed this award, J.A. 65-74, and Mardi Gras did not appeal.

action against the union and Mardi Gras, claiming entitlement to injunctive and declaratory relief under § 302. Pet. App. 63. Jurisdiction was placed under § 302(e), as well as 28 U.S.C. §§ 1331, 2201 and 2202. Pet. App. 64, ¶¶ 1-2. Mulhall alleged that he is an employee of Mardi Gras. Pet. App. 65, ¶ 6. The full text of the neutrality agreement was attached as Exhibit A to the Complaint. Pet. App. 78-86. The Complaint alleged that the agreement required Mardi Gras to deliver to the union three "things of value": employees' names and addresses, access to the casino property, and the employer's promise to be neutral about union organizing. Pet. App. 66, ¶ 9. It also alleged that the agreement contains a waiver of the employer's right to file a representation petition or unfair labor practice charges with the National Labor Relations Board ("NLRB"). Pet. App. 66, ¶ 10. The union's exchange in the neutrality agreement was to forego picketing, boycotting, striking, or other economic action against the employer. Pet. App. 66, ¶ 11; 82, ¶ 11. Mulhall also alleged that the union "agreed to expend monetary and other resources to support a ballot proposition favored by Mardi Gras." Pet. App. 66, ¶ 11.

Mulhall theorized that the three things were "things of value" within the meaning of § 302(a) because the union "subjectively desires" them, they are "objectively useful" to the union in its organizing efforts, and they have "monetary and market value." Pet. App. 68-70, ¶¶ 17, 20 and 25. No specifics were given to explain how Mulhall reached these conclusions. He

alleged, "[u]nions have made, and are liable to make, wage, benefit and other concessions at the expense of employees" in exchange for these three things. Pet. App. 72, ¶ 28. Again, no specifics were given about this union or any other union.

Mulhall contended that the union demanded the three "things of value" by serving a notice of intent to organize and filing its complaint in district court to compel arbitration. Pet. App. 67, ¶¶ 12-14. Mulhall quoted a statement in the union's petition to compel arbitration that the union and its members suffered irreparable harm because the violations of the neutrality agreement made it more difficult for the union to organize Mardi Gras employees. Pet. App. 71, ¶ 27. Mulhall's legal theory was that the three concessions are "things of value" within the meaning of § 302(a)(2) and § 302(b)(1) and are not within any of the exceptions listed in § 302(c). Pet. App. 73-74, ¶¶ 31-33, 35. He alleged that Mardi Gras would violate the law if it performed its promises in the neutrality agreement and that the union had already violated it by demanding performance. Pet. App. 74, ¶¶ 36-37. He prayed for injunctive and declaratory relief with respect to the names and addresses, access, and neutrality, stopping short of demanding an injunction against performance of the other provisions of the neutrality agreement. Pet. App. 75.

Mardi Gras answered the complaint three days after it was filed, admitting all of its allegations. J.A. 16-17. The district court dismissed the case on standing grounds. Pet. App. 29-33. The Eleventh Circuit

reversed this holding in *Mulhall I* and remanded for further proceedings. Pet. App. 60.

On remand, the district court dismissed the case for failure to state a claim under § 302. Pet. App. 13-23. It held that providing employee information, facility access, and neutrality does not constitute the "payment" or "delivery" of a "thing of value" prohibited by § 302. The court found that "[t]here is no indication of corruption or bribery of Unite Here officials" in this case. Pet. App. 19.

The district court rejected Mulhall's argument that because "the complaint alleges that the things provided to Unite Here under the MOA have 'monetary and market value' . . . he has sufficiently pled his claim for purposes of a motion to dismiss," holding that these allegations did not meet the pleading standard set forth in *Ashcroft v. Iqbal*, 556 U.S. 662, 677-679 (2009). Pet. App. 19-20. The district court also rejected Mulhall's argument that the term "thing of value" "is a term of art and thus the term should be interpreted the same way in all circumstances and under all statutes," noting that there was no "authority to support this sweeping proposition." Pet. App. 20. The district court rejected Mulhall's analogy to cases involving the criminal appropriation of confidential governmental and business information, stating that Mulhall "fail[ed] to cite a single case from any circuit that establishes that a list of employees and their addresses constitutes confidential business information." Pet. App. 21.

A divided panel of the Eleventh Circuit reversed. The majority held that the complaint sufficiently stated a claim under § 302 and remanded for further proceedings, with Judge Restani dissenting. Pet. App. 1-12. The majority recognized the contrary holdings in *Sage* and *Adcock*, but made no effort to distinguish them or argue with their reasoning. Pet. App. 5-6. Instead, it decided that in "search[ing] for the line between the proper and the improper, we must rely upon our common sense." Pet. App. 7.

The majority's analysis of whether information, access, and neutrality are "things of value" under § 302 was limited to the following: "[i]t seems apparent that organizing assistance can be a thing of value[.]" Pet. App. 7. The majority concluded that although it "can be considered valuable," "intangible organizing assistance cannot be loaned or delivered because the actions 'lend' and 'deliver' contemplate the transfer of tangible items." Pet. App. 7. But the majority concluded that such assistance "can be paid or operate as a payment," because "[w]hether something qualifies as a payment depends . . . on whether its performance fulfills an obligation." Pet. App. 8.

By its own reasoning, the majority should have stopped there. The information, facility access, and neutrality that Mardi Gras promised clearly fulfilled an obligation; they were part of a contract with the union. Perhaps recognizing that its analysis would criminalize all manner of obligations contained in labor-management agreements, the majority added a scienter requirement not found in § 302(a)(2): "If

employers offer organizing assistance with the intention of improperly influencing a union, then the policy concerns in § 302 . . . are implicated." Pet. App. 8. Thus, "innocuous ground rules can become illegal payments if used as valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer." Pet. App. 8. The court did not explain what "scheme to corrupt a union" was alleged in the complaint[3] or how an agreement giving the union the means to realize what the NLRA promotes – collective bargaining and labor peace – could be the mechanism by which corruption was accomplished. Instead, it remanded so that the district court could "determine the reason why Unite and Mardi Gras agreed to cooperate with one another." Pet. App. 9.

In dissent, Judge Restani pointed out that the complaint does not allege that Mardi Gras offered the organizing concessions as a bribe and "makes no allegation of wrongdoing relating to the formation of the Agreement[.]" Pet. App. 10, 11. But more importantly, Judge Restani pointed out that the majority's interpretation of § 302 is inconsistent with the LMRA's purpose: "The LMRA is designed to promote both labor peace and collective bargaining. The LMRA cannot promote collective bargaining and, at

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[3] As the dissent pointed out, Mulhall alleges no such thing. Rather, Mulhall "merely alleges that unions, in general, have or may have improper motives when negotiating for these concessions. . . Such general allegations are insufficient under our pleading standards." Pet. App. 11-12.

the same time, penalize unions that are attempting to achieve greater collective bargaining rights." Pet. App. 10-11 (internal citations omitted).

The union filed a petition for rehearing or rehearing *en banc*. The United States Department of Justice, the United States Department of Labor, and the NLRB filed a joint brief for the United States as *amicus curiae* disagreeing with the Eleventh Circuit's analysis and supporting the petition for rehearing. J.A. 106-125. The petition for rehearing was denied. Pet. App. 61-62. A timely petition for writ of *certiorari* followed.

SUMMARY OF ARGUMENT

1. Mulhall's theory isolates the words "thing of value" from the rest of the phrase where it appears, from § 302 as a whole, and from the rest of the NLRA. He gives these words virtually limitless meaning, to include anything useful or valuable enough to a labor organization that the organization will expend resources to attain it. He must do so because there is no other way to construe the words to condemn neutrality, access, and employees' contact information. The second part of his simple syllogism is to point out there is no exception for these in § 302(c), just as there is no exception for most other common labor-contract provisions, including recognition of the union, arbitration, and union security. There is no

exception even for collective bargaining agreements themselves.

2. "Other thing of value" in § 302 is preceded by "any money or" and therefore must be read to mean something of commercial value like money. It must be paid, lent or delivered, terms which mean the transfer of money or property. An employer's decisions concerning on how to exercise its free speech rights (including remaining silent), whom it lets on its premises, and whether to share information about its employees are not like money or other property and are not transfers. The exceptions in § 302(c) refer exclusively to money or tangible goods, and § 302(d)'s criminal penalties are geared to the monetary value of what has been transferred, underscoring the meaning of the prohibition.

3. The purpose of § 302 is to prevent the collective bargaining process from being undermined through bribery or corruption. *Arroyo v. United States*, 359 U.S. 419, 425-426 (1959). A neutrality agreement setting ground rules for a union organizing campaign and preventing strikes, picketing and boycotts during the campaign does not even remotely touch upon this purpose. Mulhall's theory, which has no bounds, would criminalize the very things the Act promotes – industrial peace, voluntary and enforceable labor-management agreements, and arbitration – for they are valuable to labor organizations and § 302 has no exceptions for them.

4. All prosecutions upheld under § 302 have been for receiving money or other commercially valuable property. None has been for entering into neutrality agreements or any component of such an agreement, including neutrality, access, or employee lists. Several courts have considered Mulhall's argument in civil cases and all but the Eleventh Circuit have rejected it completely, including the Court in *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969). They have recognized that it is a "remarkable assertion" that "makes no sense" and has no legal support. *Sage*, 390 F.3d at 219; *Adcock*, 550 F.3d at 375-376. Mulhall has been forced to try to find support by drawing from cases under other statutes with different wording and in unrelated contexts.

5. Neutrality agreements including the features attacked in this case have been routinely enforced under LMRA § 301(a) in a long line of cases following *Retail Clerks v. Lion Dry Goods*, 369 U.S. 17 (1962). The point of these agreements, an employer's voluntary recognition of a union upon a showing of majority support, is a fundamental policy under of the LMRA. Mulhall would make neutrality agreements and voluntary recognition illegal, as both are more valuable to a labor organization than the specific promises at issue and § 302 makes no exception for them. Furthermore, provisions for access and information about employees are extremely common in collective bargaining agreements and have been so since before the passage of the LMRA and the extensive amendments to § 302 in the Labor-Management

Reporting and Disclosure Act of 1959, Pub.L. 86-257, 73 Stat. 519 ("LMRDA"). Under Mulhall's theory, they are just as illegal in those agreements as in neutrality agreements, as are many other contract provisions like arbitration and union security that are at least as valuable and have no § 302 exceptions. In fact, there is no exception for collective bargaining agreements, the most valuable thing of all and the goal of the entire Act. The Third Circuit's conclusion in *Sage* that the theory would "wreak havoc" with the Act was, if anything, an understatement. Mulhall's theory is a loose cannon that would sink the ship § 302 is supposed to defend.

6. The Eleventh Circuit also shrank from Mulhall's theory but could not bring itself to agree with all the other courts that neutrality agreements are valid and enforceable, including neutrality, access, and employee information. Instead, the Eleventh Circuit decided that liability hinged on the reason "why [the union] and Mardi Gras agreed to cooperate" and whether it was a "corrupt" reason. This overlooked that § 302 is a strict-liability statute and requires no such *mens rea*. There is no allegation in the complaint that the agreement was part of some scheme for bribery and corruption, befitting Mulhall's theory that the advantages given to the union in the agreement are *ipso facto* violations. The court also overlooked the NLRA's strong policy in favor of labor-management cooperation and the constitutional protection for joint advocacy of legislation. Rather,

the court applied its "common sense" and remanded the case for inquiry into hidden motives.

ARGUMENT

I. ALL OTHER FEDERAL COURTS THAT HAVE CONSIDERED MULHALL'S THEORY HAVE REJECTED IT CATEGORICALLY.

Until the Eleventh Circuit's decision, Mulhall's theory was regarded as patently specious in all decided cases. It was first tested in *Sage*, 390 F.3d at 218-219, where it was raised as a defense in an action to compel arbitration under a neutrality agreement. Writing for the court, Judge Chertoff saw many reasons why the argument "makes no sense," including the language of § 302 itself. "The fact that a neutrality agreement – like any other labor arbitration agreement – benefits both parties with efficiency and cost saving does not transform it into a payment or delivery of some benefit. Furthermore, any benefit to the union inherent in a more efficient resolution of recognition disputes does not constitute a 'thing of value' within the meaning of the statute." *Id.* Moreover, "the structure of other provisions of the labor law also militates against Sage's position. . . . Sage's interpretation of Section 302 would wreak havoc on the carefully balanced structure of the laws governing recognition of and bargaining with unions." *Id.* How massive and far-reaching that havoc would be is described in Parts V-VII, below.

The Fourth Circuit came to the same conclusion in *Adcock*, 550 F.3d at 375-376. The agreement in question was between the truck manufacturing company Freightliner and the United Automobile Workers. It set rules for the union's planned organizing effort at Freightliner's non-union facilities in North Carolina. *Id.* at 371. The agreement provided union representatives access to the facilities to meet with employees and promised employer neutrality, among other things. *Id.* Employees sued alleging a violation of § 302. In an opinion authored by Judge Hamilton, the court concluded, "[U]nder the plain language of the statute, the concessions made by Freightliner in the Card Check Agreement did not involve the payment or delivery of a 'thing of value'." *Id.* at 374. Permitting the union access to employees does "not involve the delivery of either tangible or intangible items to the union." *Id.* This reading of the statute was consistent with the purposes of § 302, which was aimed at stopping corruption that undermined the integrity of the collective bargaining process or opened up the possibility of abuse by union officials of the wealth amassed in benefit funds. *Id.* at 375, citing *Arroyo*, *supra*. It was obvious to the court that the Freightliner agreement did not involve the problems Congress intended to fix in § 302. "By no stretch of the imagination are the concessions a means of bribing representatives of the Union. . . . Rather, the concessions served the interests of both Freightliner and the union, as they eliminate the potential for hostile organizing campaigns in the workplace." *Id.* The court also pointed to the penalty provisions of § 302

which are geared to the value of the money or other thing involved in the violation. "Thus, Congress clearly intended Section 302's 'thing of value' to have at least some ascertainable value" and Freightliner's concessions to the union had none whatsoever. *Id.*

All the district courts which have had this issue before them came to the same conclusion. *Hotel Employees & Restaurant Employees, Local 57 v. Sage Hospitality Resources, LLC*, 299 F. Supp. 2d 461, 465 (W.D. Pa. 2003) ("Defendant's reading of the statute is clearly out of context and irrelevant to the current matter."); *Patterson v. Heartland Indus. Partners, LLP*, 428 F. Supp. 2d 714 (N.D. Ohio 2006); *Adcock v. International Union, UAW*, No. 3:06-cv-32, 2006 WL 3257044, *2 (W.D.N.C. 2006) ("If the Court were to find that participation in cardcheck agreements was illegal, it would have the effect of criminalizing all collective bargaining agreements."); *see also Brylane, L.P.*, 338 NLRB 538, 538-539 (2002).

II. THE ELEVENTH CIRCUIT'S INTERPRETATION OF § 302 IS AT WAR WITH SETTLED INTERPRETATION OF LMRA § 301.

There is a long, unbroken line of cases under LMRA § 301(a) enforcing neutrality agreements like the one at issue here. At the same time Congress enacted § 302, it enacted § 301, 29 U.S.C. § 185. Pub. L. 80-101, 61 Stat. 136, 156-157. Section 301(a) gives the federal courts jurisdiction over "suits for violation of contract between an employer and a labor

organization representing employees in an industry affecting commerce as defined in this Act. . . ." The purpose of § 301(a) was to make labor contracts equally binding on both employers and unions, to the end of promoting industrial peace through the enforcement of these contracts, including the no-strike clauses Congress expected would be included in them. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 453-455 (1957). *See Groves v. Ring Screw Works*, 498 U.S. 168, 173-174 (1990); *NLRB v. American Ins. Co.*, 343 U.S. 395, 401-402 (1952) ("The National Labor Relations Act is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers.").

The "contracts" enforceable under § 301(a) are not limited to collective bargaining agreements with incumbent unions. Section 301 gives federal courts jurisdiction over agreements "between employers and labor organizations significant to the maintenance of labor peace between them." *Lion Dry Goods*, *supra*, 369 U.S. at 28. It confers jurisdiction even where the contracting union is not currently the bargaining representative for the employees. *Id.* at 27. The contract the Court enforced in *Lion Dry Goods* was between two department store employers and two unions that did not represent the stores' employees. The contract settled a strike by some of the unions' members against one store and a protracted dispute (but no strike) with the other. *Id.* at 20-21. The contract granted the union access to the employers' premises, reinstated strikers, established employment terms,

committed both the employers and the unions not to interfere with employees' rights to decide whether or not to join the union, and limited the parties' right to demand an NLRB election. *Id.* at 20 n.4. The Court rejected the employer's contention that the only contracts enforceable under § 301(a) are collective bargaining agreements "concerning wages, hours, and conditions of employment concluded in direct negotiations between employers and unions entitled to recognition as exclusive representatives of employees." *Id.* at 25-26. The Court concluded that Congress quite deliberately chose not to confine § 301(a) to collective bargaining agreements and to use the broader term "contracts", including agreements about organizing ground rules. "If this kind of strike settlement were not enforceable under § 301(a), responsible and stable labor relations would suffer, and the attainment of the labor policy objective of minimizing disruption of interstate commerce would be made more difficult." *Id.* at 27.

In the 50 years since *Lion Dry Goods*, agreements setting ground rules for union organizing have been uniformly enforced under § 301(a) in many cases throughout the country and in a wide variety of settings. This history shows the flexibility and utility of these agreements as labor-management solutions. The agreements in all the following cases – containing the same types of provisions as the agreement here – were found lawful and enforceable.

In *Amalgamated Clothing & Textile Workers Union v. Facetglas, Inc.*, 845 F.2d 1250, 1250-1251,

1253 (4th Cir. 1988), the union organized a manufacturing plant through an NLRB election but the employer decided to close the plant before a collective bargaining agreement could be negotiated. *Id.* at 1250. The employer and the union bargained about the effects of the plant closing and reached an agreement. The agreement included arrangements for a private election at the employer's new plant. *Id.* at 1250-1251. The employer promised to be neutral and not to discriminate against union supporters. *Id.* at 1251.

Hotel Employees Local 2 v. Marriott Corp., 961 F.2d 1464 (9th Cir. 1992) involved the employer's plan to build a new hotel on public land in San Francisco, which the union opposed. Marriott made an agreement with the union about ground rules for organizing at the hotel once it was built, and the union withdrew its opposition to the project. *Id.* at 1465-1466. The agreement provided for voluntary recognition if the union showed majority support among employees, employer neutrality, and hiring preference for applicants referred by the union if qualifications were equal to other applicants. *Id.* at 1466 n.2. The court held that it would enforce all these provisions. *Id.* at 1468-1470.

In *Sage*, 390 F.3d at 208-209, the employer entered into a neutrality agreement in order to get public financing for the hotel it was developing. The agreement included a no-picketing promise, a card-check procedure for recognition, and the settlement of disputes through arbitration. *Id.* at 209. It also

contained clauses identical to those Mulhall challenges here. *Sage*, 299 F. Supp. 2d at 465.

In *Hotel Employees Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561 (2d Cir. 1993), the agreement concerned an existing hotel and restaurant. The union agreed to forego its right to picket the hotel. In exchange, the employer promised to allow the union's organizers access to its property, conditioned on the union's promise not to coerce or threaten employees during such visits. *Id.* at 563. The agreement also provided for arbitration of disputes. The Second Circuit concluded that an arbitration award remedying breaches by the employer of its promises in the agreement was enforceable under § 301(a) because "its underlying aim was to resolve peacefully those tensions inevitably flowing from a union organizing effort" and the neutrality promise dealt with the hotel's relations with its employees. *Id.* at 566-567.

These agreements often are part of a larger labor-management relationship. *See Int'l Union, UAW v. Dana Corp.*, 278 F.3d 548, 550-551 (6th Cir. 2002) (in a multi-plant master labor agreement, employer neutrality in organizing campaigns at additional plants); *AK Steel Corp. v. United Steelworkers*, 163 F.3d 403, 405 (6th Cir. 1998) (in a side letter to a collective bargaining agreement, procedures to be followed if the union sought to organize the employees in another of the employer's plants or affiliate with a union already representing such employees, including employer neutrality and access). *See also Patterson v. Heartland Industrial Partners*, 428 F. Supp. 2d at

716-717 (agreement between David Stockman's investment partnership and the Steelworkers for a "constructive relationship" in union organizing of plants the firm would acquire, including furnishing employees' names and addresses, access to the workplace, and neutrality).

The agreement between a hospital system and a union in *Service Employees v. St. Vincent Med. Ctr.*, 344 F.3d 977 (9th Cir. 2003) was similar, but the union was given the option of a private election or an NLRB election, and instead of neutrality the parties agreed on specific guidelines about what and how they could communicate to employees. *Id.* at 979-980. The agreement was part of an effort by the parties to "undertake a new approach to providing quality care for patients and quality jobs for healthcare employees" and covered other subjects in addition to union organizing, including commitments to quality and accessible healthcare. *Id.*; *NY Health & Human Svs. Union v. NYU Hosp. Ctr.*, 343 F.3d 117, 118-119 (2d Cir. 2003) (same); *see also District Two, Marine Engineers Beneficial Association v. Amoco Oil Company*, 554 F.2d 774, 778-779 (6th Cir. 1977) (finding § 301(a) jurisdiction to enforce agreement between employer and union of supervisors to conduct representation election, even though outside NLRB jurisdiction because supervisors are not "employees").

Neutrality agreements with provisions like the ones here are very common.[4] If Mulhall were correct, the agreements in *Lion Dry Goods* and its progeny were illegal and unenforceable because they "paid" or "delivered" a "thing of value" under § 302. But Congress could not have intended that agreements that were illegal under § 302 would nevertheless be enforceable under its companion, § 301(a). *Lion Dry Goods* and all the cases following it would have to be overruled to sustain Mulhall's theory. Employers' freedom of contract – another key element of federal labor policy – would be impaired. *See H. K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970).

III. THE LMRA REQUIRES THAT ARBITRATION BE FOSTERED, NOT CRIMINALIZED.

The neutrality agreement provides that all disputes arising under it will be resolved through arbitration. Pet. App. 84-85, ¶ 14. The courts of appeals have invariably enforced arbitration requirements in neutrality agreements, often relying on *AT&T Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643 (1986). They have compelled arbitration. *Sage*, *supra*; *NY Health & Human Svs. Union*, *supra*; *South Bay Boston Mgmt. v. UNITE HERE Local 26*,

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[4] *See* James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 828-831 (2005); Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 INDUS. & LAB. REL. REV. 42, 45-46 (2001).

587 F.3d 35, 42 (1st Cir. 2009) (enforcing neutrality agreement's arbitration clause over employer's claim that the agreement was void *ab initio*). They have enforced arbitration awards. *Hotel Employees Local 217*, *supra*; *AK Steel Corp.*, *supra*; *Dana Corp.*, *supra*.

In *Hotel Employees Local 217*, 996 F.2d at 567, the Second Circuit stated that its decision to enforce the neutrality agreement was "strengthened by the significant inclusion in the contract of an arbitration provision" because "[a]rbitration is strongly favored as a mechanism to resolve disputes in the workplace, and to a large extent arbitral decisions are insulated from judicial review," citing *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 37 (1987). It pointed out that this Court has held that employers and unions may make enforceable, private arbitration agreements for resolution even of representation issues, particularly where this is a substitute for labor strife, citing *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 272 (1964) and *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

Neutrality agreements like the one at issue here privatize the organizing process. Both parties agree not to file unfair labor practice charges with the NLRB. All matters that might have been charges, as well as all other disputes under the agreement, are settled through arbitration rather than the NLRB's lengthy and expensive processes. In addition to preserving labor peace, the neutrality agreement thus carries out an essential policy of the Taft-Hartley Act.

Boys Markets, Inc. v. Retail Clerks, Local 770, 398 U.S. 235, 251-253 (1970); *Collyer Insulated Wire*, 192 NLRB 837 (1971).

The Court decided in *Boys Markets* that the policy favoring arbitration is so strong it should trump the plain language of § 7 of the Norris-LaGuardia Act, 29 U.S.C. § 107. In the LMRA, the "congressional emphasis shifted from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes." *Id.* at 251. The Court noted the "importance that Congress has attached generally to the voluntary settlement of labor disputes without resort to self-help and more particularly to arbitration as a means to this end," *id.* at 252, the effectiveness of which would be greatly reduced without a mechanism to prevent "resort to strikes, walkouts, or other self-help measures" over arbitrable matters, *id.* at 249. It therefore held that the federal courts may enjoin strikes over violations of collective bargaining agreements containing arbitration provisions despite the absence of any applicable exception in § 4 of the Norris-LaGuardia Act. *Id.* at 252-253. "The literal terms of § 4 of the Norris-LaGuardia Act must be accommodated to the subsequently enacted provisions of § 301(a) of the Labor Management Relations Act and the purposes of arbitration. Statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the

policies that inspired ostensibly inconsistent provisions." *Id.* at 250.

Arbitration is so important to a union as a means of saving time and expense in resolving disputes that it gives up its most potent tool, the right to strike, in exchange. *See id.* at 248. Nevertheless, Mulhall's logic means that an employer's agreement to arbitrate is illegal because it *is* so valuable to the union and there is no exception for it in § 302(c).

IV. SECTION 302'S LANGUAGE, CONTEXT, AND LEGISLATIVE HISTORY MAKE CLEAR THAT IT DOES NOT APPLY TO THE CHALLENGED CLAUSES.

A. Neutrality, Employee Information, And Facility Access Are Not "Money Or Other Things Of Value" That May Be "Paid, Lent Or Delivered."

It is clear from § 302's language and context that Congress did not intend it to criminalize employer neutrality or agreements that provide unions access to facilities and employee information. An employer "pay[s], lend[s], or deliver[s] any money or other thing of value" within the meaning of § 302 only when it transfers to a union money or property with an objective, market-based value. An employer's agreement to abstain from doing some act that it otherwise has a right to do – like speaking against unionization or trespassing union organizers – is not the "payment" or "delivery" of a "thing of value." Nor does § 302(a) reach an employer's agreement to provide a union

some arguable, intangible "thing" – like employee contact information – whose only value is subjective and inseparable from the admittedly legal goals of communicating with employees and seeking voluntary recognition.

Mulhall's reading relies on tortured syntax. As a matter of basic usage, much of Mulhall's interpretation is senseless. No one would say that a person "pays" or "delivers" neutral speech (or the absence of speech) to someone else, or that the other person "receives or accepts" it. *See Sekhar v. United States*, 570 U.S. ___, 133 S.Ct. 2720, 2727 (2013) ("No fluent speaker of English would say that 'petitioner *obtained and exercised* the general counsel's right to make a recommendation,' any more than he would say that a person 'obtained and exercised another's right to free speech.'"). Nor does one "pay" access to one's real property to someone else. A person can "deliver" *possession* of property, but only in the sense of formally transferring title or deed. *See* BLACK'S LAW DICTIONARY (6th ed. 1990), at 428-429 ("*Delivery*: The act by which the res or substance thereof is placed within the actual or constructive possession or control of another"; "The final and absolute transfer of a deed, properly executed, to the grantee, or to some person for his use, in such manner that it cannot be recalled by the grantor"); BLACK'S LAW DICTIONARY (3d ed. 1933), at 548 ("*Delivery*: The final and absolute transfer of a deed, properly executed, to the grantee, or to some person for his use, in such manner that it cannot be recalled by the grantor."; "The tradition or

transfer of the possession of personal property from one person to another."); III OXFORD ENGLISH DICTIONARY (Oxford: The Clarendon Press 1933), at 167 (Deliver: "*Law*: To give or hand over formally (*esp.* a deed to the grantee, or to a third party . . . So 'to deliver' seisin of hereditaments, or a corporeal chattel."). Nothing of the sort is involved here. Mardi Gras has not "delivered" possession or control over its property to the union; it has simply limited its freedom to exercise its own possessory rights. *See Adcock*, 550 F.3d at 374; *Scheidler v. Nat'l Org. for Women*, 537 U.S. 393, 401-402 (2003) (characterizing restrictions on a business's "intangible right to exercise exclusive control over the use of its assets" as "obtaining of property from" that business under the Hobbs Act "would be an unwarranted expansion of the meaning of that phrase") (italics and internal quotation omitted).

The Eleventh Circuit improperly stretched terms to their outermost definitional possibilities. The Eleventh Circuit decided that the terms "pay" and "payment" meant any action that "fulfills an obligation" to a union. Pet. App. 8. But that expansive definition would lead to untoward results in a statute whose central goal is encouraging – not criminalizing – mutual obligations between unions and employers. While it is possible to interpret "payment" figuratively as any fulfillment of an obligation, "[i]n a more restricted legal sense payment is the performance of a duty, promise, or obligation, or discharge of a debt or liability, by the delivery of money or other

value by a debtor to a creditor, where the money or other valuable thing is tendered and accepted as extinguishing debt or obligation in whole or in part." BLACK'S LAW DICTIONARY (6th ed. 1990), at 1129; *ibid.* ("Payment is a delivery of money or its equivalent in either specific property or services by one person from whom it is due to another person to whom it is due."); BLACK'S LAW DICTIONARY (3d ed. 1933), at 1339 ("*Pay*: To discharge a debt; to deliver to a creditor the value of a debt, either in money or in goods, for his acceptance. . . . The term, however, is sometimes limited to discharging an indebtedness by the use of money."); VII OXFORD ENGLISH DICTIONARY, *supra*, at 577: (Pay: "To give, deliver, or hand over (money, or some other thing) in return for goods or services, or in discharge of an obligation; to render (a sum or amount owed)."); *cf. id.* at 578 ("*fig.* (or in figurative expressions): to give or render (anything owed, due, or deserved); to discharge (an obligation).").

Nor is it valid to conclude, as the Eleventh Circuit apparently did, that because neutrality, facility access, and employee information have utility to a union, they are "things of value" within the meaning of § 302(a). If considered in isolation, the term "thing of value" is virtually limitless, and providing a union "anything" that it values becomes criminal bribery. But this Court has often rejected such myopia. *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) ("Particularly when interpreting a statute that features as elastic a word as 'use,' we construe language in its context and in light of the terms surrounding it."); *Dolan v. U.S.*

Postal Serv., 546 U.S. 481, 486 (2006) ("A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis."); *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961).

The words "thing of value" must be read in context. Congress made the words "thing of value" part of a larger phrase – "any money or other thing of value." Interpreting the phrase "thing of value" to mean anything that is of utility or subjectively valuable to a union reads the words "money or other" out of the statute. Money is something of utility and subjective value to a union, and so is subsumed by the Eleventh Circuit's definition of "thing of value." But this definition makes reference to "money" in § 302(a) superfluous. *See Duncan v. Walker*, 533 U.S. 167, 174-175 (2001); *Babbitt v. Sweet Home Chapter of Cmtys. for Great Ore.*, 515 U.S. 687, 698 (1995). On the other hand, reading the residual phrase "other thing of value" to include only property that is not money but is "like" or equivalent to money "does not make the word[s] identical to [their] statutory neighbor[ ]." *Bullock v. BankChampaign, N.A.*, 569 U.S. ___, 133 S.Ct. 1754, 1760 (2013). The juxtaposition of "other thing of value" with "money" demonstrates that Congress intended to limit covered "things of value" to "things" that are monetary equivalents. *See, e.g.*, *Duffy v. Cent. R.R. Co. of N.J.*, 268 U.S. 55, 64 (1925)

(interpreting "rentals or other payments required to be made as a condition to the continued use or possession of property" in Revenue Act of 1916 to exclude payments for costs of improvements because "the phrase 'or other payments' . . . was evidently meant to bring in payments *ejusdem generis* with 'rentals'"); *Norfolk & W. Ry. Co. v. Train Dispatchers*, 499 U.S. 117, 129 (1991) ("[W]hen a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration"); *Wash. State Dept. of Soc. & Health Servs. v. Keffeler*, 537 U.S. 371, 384 (2003).

Congress used the word "any" to modify the entire phrase "money or other thing of value" rather than the words "other thing of value" (as in "money or *any* other thing of value"). Because the term "money" is definite in its nature, "any" must refer to *quantity*, rather than to the nature or quality of the thing being transferred. In making clear that there would be no *de minimis* exception to the amount of "money or other thing of value" transferred, Congress demonstrated that covered "things of value" must be quantifiable in number (i.e., tangible "things") or, at the least, have some quantifiable monetary value. *See also* 29 U.S.C. § 186(d)(2) (distinguishing felonies from misdemeanors based on "the value of the *amount* of money or thing of value involved") (emphasis added). Section 302(c)(3)'s exception for "the sale or purchase of an *article or commodity* at the prevailing market price in the regular course of business" further supports the interpretation of "thing of value" as

referring to property with a quantifiable, market-based value. 29 U.S.C. § 186(c)(3) (emphasis added).[5]

Other parts of § 302 make Mulhall's and the Eleventh Circuit's interpretation indefensible. It is clear that Congress intended "payments" to labor organizations and their representatives mandated by collective bargaining agreements to be covered by § 302(a) because § 302(f) exempted "contract[s] in force on June 23, 1947" from coverage. 29 U.S.C. § 186(f). But the exceptions listed in § 302(c) that relate to employer payments that are authorized in collective bargaining agreements – compensation paid to employees who are also union representatives, dues covered by check-off clauses, and money remitted to trust funds – all involve the "payment" of money. 29 U.S.C. §§ 186(c)(1), (c)(4), (c)(5); *see also* 29 U.S.C. §§ 186(c)(6)-(9).

Congress did not include exceptions for the many garden-variety contract clauses that do not involve

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[5] The Court is not required to determine in this case whether intangible property with an objective, market-based value may be a "thing of value" paid or delivered under § 302. But given § 302's contextual features, it is likely that Congress intended to limit the term "thing" to its common, corporeal meaning. *See* XI OXFORD ENGLISH DICTIONARY, *supra*, at 309 (Thing: "[11] A material object, a body; a being or entity consisting of matter, or occupying space. (Often a vague designation for an object which it is difficult to denominate more easily.)"; "[12a] A collective term for that which one possesses; property, wealth, substance. [b] A piece of property, an individual possession; usually in *pl.*, possessions, belongings, goods[.]").

the transfer of money or monetary equivalents, but that do "fulfill an obligation" and that unions consider valuable to their institutional interests, enough so that they will expend resources to attain them. A partial list includes, in addition to the specific clauses that Mulhall challenges, exclusive control over the grievance process (*see Vaca v. Sipes*, 386 U.S. 171, 191-192 (1967)); arbitration (*see supra* at 24-27); union security clauses (*see Marquez v. Screen Actors Guild*, 525 U.S. 33 (1998)); an employer's no-lockout promise; and super-seniority for union stewards (*see Aeronautical Industrial District Lodge 727 v. Campbell*, 337 U.S. 521, 527-528 (1948)). All of these concessions are economically valuable to unions, and employers give them in return for consideration, including union promises not to strike. But it is beyond doubt that Congress did not intend – covertly and with no legislative discussion either before or since – to criminalize these common contract terms. The absence of a statutory exception for any of them demonstrates the error of the Eleventh Circuit's reading of §302(a).

The canon of strict construction applies. Perhaps sensing this, the Eleventh Circuit majority pulled back and concluded that it is only criminal for an employer to enter into an agreement containing the challenged clauses with the "intent[] of improperly influencing a union." Pet. App. 8. But this scienter requirement is not part of § 302(a)(2), "a criminal provision, *malum prohibitum*, which outlaws all payments, with stated exceptions, between employer and representative." *United States v. Ryan*, 350 U.S. 299,

305 (1956); *United States v. Phillips*, 19 F.3d 1565, 1581-1582 (11th Cir. 1994). Because § 302(a)(2) does not require any wrongful intent, adopting an interpretation of "thing of value" as fuzzy as "anything sufficiently useful to a union that it will expend resources to attain it" would raise serious due-process concerns. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) ("As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."); *United States v. Lanier*, 520 U.S. 259, 266-267 (1997) ("[A]s a sort of 'junior version of the vagueness doctrine,' the canon of strict construction of criminal statutes . . . ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered.") (internal citation omitted).

Application of the strict-construction doctrine is especially appropriate to a statute that draws the line between misdemeanor and felony based on the dollar value of the "money or other thing of value" paid or delivered. 29 U.S.C. § 186(d)(2); *Bifulco v. United States*, 447 U.S. 381, 387 (1980) (application of the doctrine to a criminal penalty provision "'means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended'") (quoting *Ladner v. United States*, 358 U.S. 169, 178

(1958)). It is hard to believe that Congress intended – in a strict-liability statute – to make the line between spending up to five years in prison or less than one year hinge on the subjective value a union placed on a contractual obligation, or the amount of resources a union was willing to expend to attain it. *See Adcock*, 550 F.3d at 375.

B. The Legislative History Of § 302 Confirms That It Was Intended To Cover Only Transfer Of Money And Property With An Objective Monetary Value.

There is not the slightest indication in the legislative history of either the 1947 Taft-Hartley amendments or the revisions to § 302 in the LMRDA that Congress intended to criminalize an employer's agreement to remain neutral during union organizing or to provide a union facility access or employee information. The scope of § 302 generally, and the "payment" or "delivery" of "any money or other thing of value" specifically, must be understood in light of Congress's purpose in enacting the statute. *See Reves v. Ernst & Young*, 494 U.S. 56, 62-63 (1990) ("[T]he phrase 'any note' should not be interpreted to mean literally 'any note,' but must be understood against the backdrop of what Congress was attempting to accomplish in enacting the Securities Acts."); *NLRB v. International Longshoremens' Association*, 447 U.S. 490, 504 (1980) (holding that although the literal language of the "hot cargo" prohibition of 29 U.S.C. § 158(e) does not distinguish between primary and

secondary effects, "Congress intended to reach only agreements with secondary objectives."). Congress's purpose in enacting § 302 did not include making common forms of labor-management cooperation a federal crime.

Section 302 originated in the Senate, and was intended, primarily, as a "stopgap" measure to regulate employer payments to union welfare funds. *See* 93 Cong. Rec. 4747 (1947), reprinted in 2 Legislative History of the Labor Management Relations Act, 1947, at 1313 (1948) ("Legis. Hist. LMRA") (remarks of Senator Taft); *id.* at 1304 (remarks of Senator Ball); S. Rep. No. 105, 80th Cong. 1st Sess. 52 (1947), reprinted at 1 Legis. Hist. LMRA, at 458. A second purpose was to criminalize "extortion" by union representatives for "personal advantage." *Id.* at 1311 (remarks of Senator Taft); *id.* at 458 ("Thus, the amendment makes extortion illegal and also prevents the check-off of union dues unless authorized in writing by the individual employee."); *see* Note, *Taft-Hartley Regulation of Employer Payments to Union Representatives: Bribery, Extortion and Welfare Funds under Section 302*, 67 YALE L.J. 732, 732-736 (1958). As this Court summarized:

> Those members of Congress who supported the amendment were concerned with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse by union officers of the power which they might

> achieve if welfare funds were left to their sole control. Congressional attention was focused particularly upon the latter problem[.]

Arroyo, *supra*, 359 U.S. at 425-426.

The antecedent of Congress's use of "any money or other thing of value," then, was common-law extortion, which involved the wrongful taking of money or some tangible, valuable property. 2 E. Coke, The First Part of the Institutes of the Laws of England 368b (18th English ed. 1823) ("Extortion . . . is a great misprision, by wresting or unlawfully taking by any officer, by color of his office, any money or valuable thing of or from any man"); 4 W. Blackstone, Commentaries 141 (Univ. of Chicago Press 1979) (extortion is "an abuse of public, justice which consists in any officer's unlawfully taking, by colour of his office, from any man, any money or thing of value."); *see Sekhar*, 133 S.Ct. at 2724 (at common law, "[e]xtortion required the obtaining of items of value, typically cash, from the victim."); *Scheidler*, 537 U.S. at 402 ("At common law, extortion was a property offense committed by a public official who took 'any money or thing of value' that was not due to him under the pretense that he was entitled to such property by virtue of his office.").

Common-law extortion was distinct from the statutory crime of "coercion" – the use of threats to "'compel another person to do or abstain from doing an act which such person has a legal right to do or to abstain from doing.'" *Sekhar*, 133 S.Ct. at 2725

(quoting N.Y. Penal Code § 653 (1881)). What Mulhall incorrectly characterizes as "things of value" here – Mardi Gras' agreeing to limit its own speech and property rights, and ultimately agreeing to recognize the union on a showing of majority support – could only be an object of coercion, not a thing of value subject to extortion. *People v. Weil*, 273 N.Y. 653, 8 N.E.2d 332 (1937) (defendant guilty of statutory coercion where he "unlawfully did use and attempt intimidation of a stated person by threats and force with a view to compel him to do an act which such person had a legal right to abstain from doing, to wit, to compel him to enter into a certain agreement with a labor union"); *People v. Scotti*, 266 N.Y. 480, 195 N.E. 162 (1934); *see Scheidler*, 537 U.S. at 405-406; *Sekhar*, 133 S.Ct. at 2725-2726.

Congress made major substantive revisions to § 302 in the LMRDA, prompted by the McClellan Committee's sensational "investigation . . . of the extent to which criminal or other improper practices or activities are, or have been, engaged in the field of labor-management relations . . . " S. Res. 74, 85th Cong. (1957), reprinted in Hearings Before the Select Committee on Improper Activities in the Labor or Management Field, 85th Cong., pt. 1, at 1 (1957); Benjamin Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 851, 892 (1960). The committee's mission was to focus on "problems inherent in labor-management collusion . . . violence, shakedowns and extortions." S. Res. 74, at p. 2. But in none of the McClellan Committee's

many hearings – extending from 1957 to 1959, is there any notion that such "collusion" and "extortions" might include employer neutrality toward organizing, providing unions access to facilities and information about employees, or voluntary recognition of labor organizations as employee representatives.

The addition in the LMRDA of limits on recognitional picketing, § 8(b)(7), 29 U.S.C. § 158(b)(7), further discredits the Eleventh Circuit's theory. If voluntary recognition were a "thing of value" under § 302, then picketing to get it would certainly be a "demand" and therefore a violation. Section 8(b)(7) would not have been needed if recognitional picketing were already a violation of § 302. Also § 8(b)(7) actually allows recognitional picketing to take place for some time (or without time limit if there is no work stoppage), something Congress would hardly have provided if it thought such picketing was already prohibited by § 302, and without making an exception for it in § 302(c). *Cf.* 29 U.S.C. § 522, also added by the LMRDA (prohibiting extortionate picketing to take or obtain any "money or other thing of value" for "personal profit or enrichment").

C. All Decisions Finding § 302 Violations Besides The Eleventh Circuit's Have Involved Payments Of Money Or Property With Objective, Market-Based Value.

No reported case in the last 65 years has identified conduct remotely like that described in the neutrality agreement as violating § 302. All of the cases in which courts have upheld convictions under § 302 have involved the transfer of money or a thing with an objective, market-based value. *See, e.g.*, *Int'l Longshoremen's Ass'n v. Seatrain Lines, Inc.*, 326 F.2d 916, 918-920 (2d Cir. 1964) (payments made directly by employer to union to compensate the union for lost revenues as a result of containerization); *United States v. Fisher*, 387 F.2d 165, 168 (2d Cir. 1967) (employer's delivery of free construction materials to union official); *United States v. Ferrara*, 458 F.2d 868, 870 (2d Cir. 1972) (restaurant coffee supplier's payment of commissions to union officials in scheme to force restaurant to purchase supplier's coffee); *United States v. Pecora*, 484 F.2d 1289, 1291 (3d Cir. 1973) (contributions to union official's honorary dinner that bore no resemblance to cost of event, where surplus proceeds went to the union official in cash); *United States v. Boffa*, 688 F.2d 919, 935 (3d Cir. 1982) (employer's payment of lease and provision of car to union official); *United States v. Carlock*, 806 F.2d 535, 555 (5th Cir. 1986) (employer payments to union official's daughter-in-law's company); *United States v. Schiffman*, 552 F.2d 1124, 1125 (5th Cir. 1977) (union official's demand for hotel room rates $1,200 less than

what the union would have paid under generally applicable corporate rates); *Korholz v. United States*, 269 F.2d 897, 899-900 (10th Cir. 1959) (employer payments to union official's third-party creditor in satisfaction of union official's debts); *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1393-1394 (11th Cir. 1994) (monthly payments of pension benefits to union negotiators in return for concessions); *see also United States v. Freuhauf*, 365 U.S. 146, 152 (1961) (employer's low-interest loans to union official).

On the few occasions that litigants have ventured arguments similar to the ones Mulhall makes, courts have dismissed the arguments as baseless. *United States v. Cervone*, 907 F.2d 332, 347 (2d Cir. 1990) ("intangible value of a continuing ability to influence corrupt union practices" is not a "thing of value" under § 302; "[t]he government cites no caselaw to support its intangible benefit theory, and we are aware of none"); *Zentner v. Am. Fed'n of Musicians*, 237 F. Supp. 457, 463 (S.D.N.Y. 1965) ("[W]here, as here, an employer is requested merely to furnish 'the names, addresses and locals of all members performing such engagement, and the scale wages received by each member' in order to secure enforcement of the union's dues structure, it would be a perversion of the Congressional purpose to construe the phrase 'any . . . thing of value' to include the requested information."), *aff'd Zentner v. Am. Fed'n of Musicians of U.S. & Canada*, 343 F.2d 758, 758-759 (2d Cir. 1965); *Shapiro v. Rosenbaum*, 171 F. Supp. 875, 878 n.8 (S.D.N.Y. 1959) (rejecting "the extraordinary contention" that

employers' promises in collective bargaining agreements to make payments that were otherwise lawful under § 302 were nonetheless criminal because they served as consideration for the agreements and were desired by the union; "[T]he Court will state that it considers such a contention to be patently without merit. Plaintiffs' position in this respect could only be sustained by a construction of Section 302 which would abolish collective bargaining by making illegal every employer's promise to a union which contemplated a benefit to anyone, including the employer's own employees."); *see infra* at 48-54.

In two cases, courts included loose *dicta* in their opinions, claiming that § 302 reaches transfers of intangibles without any fixed monetary value. *United States v. Roth*, 333 F.2d 450, 453 (2d Cir. 1964) ("Value is usually set by the desire to have the 'thing' and depends upon the individual and the circumstances."); *United States v. Douglas*, 634 F.3d 852, 858 (6th Cir. 2011) ("Truly, of all the things in this world widely regarded as valuable, money and the like comprise only a small percentage."), *cert. denied*, 131 S.Ct. 3039 (2011). Mulhall pounced on these *dicta*, and the Eleventh Circuit majority recited them unquestioningly. Brief of Appellant Martin Mulhall (11th Cir. March 21, 2011), at 19; Pet. App. 6. But *Roth* involved an employer that lent nearly $100,000 to a union representative on a no-interest, no-collateral basis. *Roth*, 333 F.2d at 451-452. *Douglas* involved union officials' demand that the employer pay their cronies $150,000 a year in order to settle

a strike. *Douglas*, 634 F.3d at 858. These cases do not provide any support for Mulhall's theory.

D. Isolating The Phrase "Thing Of Value" And Arguing That It Holds The Same Meaning Across Statutory Contexts Is An Unsound Interpretive Method.

Because his theory finds no support in any § 302 caselaw and is at odds with the LMRA's language, context, and purpose, Mulhall seeks to expand the interpretive field by isolating the phrase "thing of value" and claiming that it is a "term of art" that carries the same meaning across statutory contexts. This would be an unsound approach to statutory construction even if "thing of value" had some universal meaning. *Johnson v. United States*, 559 U.S. 133, 139-140 (2010) ("Although a common-law term of art should be given its established common-law meaning, we do not assume that a statutory word is used as a term of art where that meaning does not fit. Ultimately, context determines meaning, and we 'do not force term-of-art definitions into contexts where they plainly do not fit and produce nonsense.'") (internal citations omitted).

Statutory variations on the phrase "thing of value" exist in highly disparate contexts, and it makes no sense to argue that the term means the same in each of them. This is clear from even the small sample of statutes that Mulhall cites. Mulhall Mem. Supp. Pet., at 5-6 & n.3. Some do not use the

phrase "any money or other thing of value" at all, but rather the expansive "anything of value." 5 U.S.C. § 7353 ("[N]o Member of Congress or officer or employee of the executive, legislative, or judicial branch shall solicit or accept *anything of value* from a person. . . ."); 18 U.S.C. § 201(b)(1); 18 U.S.C. § 666. Others do not link the phrase "thing of value" semantically to the word "money," as § 302 does, and so indicate that it has a separate meaning. 18 U.S.C. § 641 (prohibiting the conversion of "any record, voucher, money, or thing of value of the United States or of any department or agency thereof"); 18 U.S.C. § 912 (person who pretends to be an officer of the United States and "in such pretended character demands or obtains any money, paper, document, or thing of value" guilty of felony); 18 U.S.C. § 1954; 12 U.S.C. § 2607. Moreover, the criminal statutes Mulhall cites all involve some independently wrongful intent and act – such as fraud, conversion, or extortion by threat of physical harm, kidnapping, or injury to property – as § 302 does not. The factual scenarios in which prosecutions arise have nothing to do with the facts here. *See* Pet. Response to Cross-Pet., at 18.

This is only the tip of the iceberg. The phrase "money or other thing of value" exists in many other state and federal statutes. It appears in statutes regulating campaign contributions (2 U.S.C. § 441e(a)(1)(A)); banning unauthorized payments for child adoption (Mich. Comp. Laws § 710.54); barring apartment owners from selling commercial access to tenants for

the purpose of "selling or delivering fuel, ice or food" (N.Y. Real Prop. Law § 238); regulating abusive telemarketing (15 U.S.C. § 6106(4)); defining "gambling," as in the federal statute criminalizing "gambling ships" on the high seas (18 U.S.C. § 1081);[6] and prohibiting aggressive panhandling (*see Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 552 (4th Cir. 2013)), among many others. The notion that a single definition of "thing of value" can apply across these varied contexts is far-fetched, to say the least.

Defining a candidates' speech to be a "thing of value" under a statute regulating campaign practices can raise significant First Amendment problems. *See Brown v. Hartlage*, 456 U.S. 45, 56-57 (1982) (campaign promise to accept lower salary while in office could not constitutionally be considered the promise of a "thing of value" in return for votes under Kentucky Corrupt Practices Act). Defining leniency in

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[6] A now-forgotten judicial battle raged in the 1940s and 50s over whether pinball machines were banned by state statutes prohibiting "gambling devices" on which "a thing of value" could be won. *See* 89 A.L.R.2d 815, § 3(a) (originally published in 1963); *compare People v. Horton*, 33 Misc.2d 294, 295 (N.Y. Police Ct. 1961) (holding that winning extra plays in pinball is not a "thing of value": "In this case, the player, if he is skillful enough, can obtain an additional ball which adds to his score. There is no element of chance and the user of the machine does not receive any monetary reward for his effort.") *with Thamart v. Moline*, 66 Idaho 110, 156 P.2d 187, 187-188 (Idaho 1945) ("the chance a player takes, in getting extra plays" covered by gambling-device statute because "amusement, or the right to participate in the game or to shoot the balls used in playing that game, [is] a thing of value.").

prosecution as a "thing of value" makes sense in a statute prohibiting public officers from being "influenced or rewarded in connection with any [public] business . . . involving *anything of value*[.]" 18 U.S.C. § 666(a)(1)(B); *United States v. Freeman*, 208 F.3d 332, 341-342 (1st Cir. 2000) (strip club owner's providing police officers with cash, free drinks and access to dancers' dressing rooms in exchange for police leniency violated 18 U.S.C. § 666(a)(1)(B)). But it makes no sense at all in a witness-tampering statute that prohibits public officials from "promis[ing] *anything of value* to any person, for or because of the testimony under oath or affirmation given or to be given by such person[.]" 18 U.S.C. § 201(c)(2); *United States v. Condon*, 170 F.3d 687, 689 (7th Cir. 1999) (Easterbrook, J.) ("Forgoing criminal prosecution (or securing a lower sentence) is not a 'thing of value' within the meaning of § 201(c)(2). . . . [T]reating immunity from prosecution (or a prosecutorial promise that would lead to a lower sentence) as a 'thing of value' would put § 201(c)(2) at war with a long history of lawful inducements to testify[.]") (internal citation omitted).

Mulhall's expansive reading of the phrase "thing of value" in § 302(a) puts it similarly at war with the LMRA's purpose and history.

V. NEUTRALITY, ACCESS, AND EMPLOYEE INFORMATION ARE LONG-STANDING STAPLES OF LABOR RELATIONS WHICH HAVE NEVER BEFORE BEEN QUESTIONED UNDER § 302.

The destabilizing effect of the Eleventh Circuit's decision is strongly demonstrated when each provision of the neutrality agreement that Plaintiff alleges to be illegal is considered separately. Each has been approved and occupies a long-standing and well-established place in labor law.

Neutrality. Employers have a right of free speech under § 8(c) of the NLRA, 29 U.S.C. § 158(c). This provision was added by the Taft-Hartley amendments at the same time as § 302.[7] *See Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 67 (2008). Employers may oppose unionization, but they may also speak in favor, *NLRB v. O'Keefe & Merritt Mfg. Co.*, 178 F.2d 445, 447-448 (9th Cir. 1950), *Coamo Knitting Mills*, 150 NLRB 579, 580-581 (1964), or stay neutral, *Kimbrell v. NLRB*, 290 F.2d 799, 801-802 (4th Cir. 1961).

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[7] At the time of the Taft-Hartley amendments, many collective bargaining agreements contained neutrality provisions, or "harmony clauses." Prentice-Hall, 4 *Labor Equipment*, "Union Contracts and Collective Bargaining" (Prentice-Hall 1946) ("Prentice-Hall"), at ¶ 53,352 ("contracts frequently contain the equivalent of what in international relations is referred to as a non-aggression pact. In the field of labor relations, these mutual pledges are something called non-discrimination or harmony clauses. . . . [T]hese clauses contain: . . . mutual pledges by employer and union not to engage in antagonistic propaganda.").

In *Hotel Employees v. Marriott*, *supra*, the court found that employer neutrality did not contravene any existing federal labor policy. "Nothing in the relevant statutes or NLRB decisions suggests employers may not agree to remain silent during a union's organizational campaign – something an employer is certainly free to do in the absence of such an agreement." 961 F.2d at 1470. Employers have a right of free speech under § 8(c) of the LMRA but "[t]his provision does not suggest an employer's agreement not to express its views is unenforceable." *Id.* The Sixth Circuit agreed in *UAW v. Dana*, 278 F.3d at 558-560. "[A]n employer's voluntary agreement to silence itself during union organizing campaigns does not violate federal labor policy." *Id.* at 558. *See also Amalgamated Clothing*, *supra,* 845 F.2d at 1253; *AK Steel*, *supra,* 163 F.3d at 407-408.

Under the neutrality agreement at issue here, the employer agreed to stay neutral and not try to influence its employees' decisions. An employer is not required to speak against unionization. Requiring it to do so – on threat of criminal sanction – is inimical to the free-speech policy "which suffuses the NLRA" and to Congress's deregulation of employer speech about unionization in § 8(c):

> In 1941, this Court curtailed the NLRB's aggressive interpretation, clarifying that nothing in the NLRA prohibits an employer "from expressing its view on labor policies or problems" unless the employer's speech "in connection with other circumstances [amounts]

> to coercion within the meaning of the Act." *NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469, 477. We subsequently characterized *Virginia Electric* as recognizing the First Amendment right of employers to engage in noncoercive speech about unionization. *Thomas v. Collins*, 323 U.S. 516, 537-538 (1945).

Chamber of Commerce, 554 U.S. at 66-67; *see Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *W.Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). "[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796-797 (1988) (emphasis in original). The decision below violates this right not to speak by threatening civil and criminal punishment of employers who choose not to speak against unionization and agree to be neutral.

Union access. Granting access to union representatives was a very common practice throughout many industries when the LMRA was enacted. The NLRB reported in 1940 that "[u]nion representatives are permitted to enter the shop for the purpose of discussing grievances with the employees in the shoe, fur, men's clothing, women's clothing, bakery and confectionery, upholstery and floor-covering, cement and plaster, bricklaying, plumbing, leather, automobile, flat-glass, shipbuilding, rubber, brewery, gas, coke, and chemical, electrical, radio and machine, and

printing industries." *In the Matter of Cities Service Oil, et al.*, 25 NLRB 36, 50 (1940). In the maritime industry, unions had access to 95 per cent of American ships, except tankers, and to 50 per cent of tankers. *Id.* This was not recent; it went back more than 35 years. *Id.* at n.29. The practice continued on through the war and after. *Richfield Oil Corp.*, 49 NLRB 593, 602 (1943); *Heinz, H. J., Co.*, 72 NLRB 316, 329 (1947); Bureau of National Affairs, BASIC PATTERNS IN UNION CONTRACTS (4th ed. 1957), at 65:6 (39% of surveyed collective bargaining agreements included provision granting union officials plant access); *Murphy Diesel Co.*, 120 NLRB 917, 923 (1958).

Employers may exclude union organizers from their property in most instances. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 535-538 (1992). In some circumstances, however, the NLRA is interpreted to require an employer to let them on the premises. *Id.* at 539-540. Employers can also agree to permit access, as so many have done over the entire history of the NLRA and before. When they do so, the agreement is binding and enforceable. *Lion Dry Goods*, 369 U.S. at 20 n.4. It is a "mandatory subject of bargaining" which an employer may not change unilaterally. *Beverly Health v. NLRB*, 317 F.3d 316, 321-322 (D.C. Cir. 2003); *Facet Enters., Inc. v. NLRB*, 907 F.2d 963, 983 (10th Cir. 1990) (plant access among the "important areas of labor-management relations"); *NLRB v. Great Western Coca-Cola Bottling Co.*, 740 F.2d 398, 402-404 (5th Cir. 1984); *Boyer Bros.*, 217 NLRB 342, 344 (1975). This ancient practice and doctrine would

be legally impossible if providing access to a union were "delivering" or "paying" a "thing of value" and a § 302 violation.

Employees' names and addresses. The NLRB has long required employers to supply lists of names and addresses of employees eligible to vote in union elections, following *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966).[8] It adopted this approach in order to benefit employees by opening up communication. *Id.* at 1240. This Court approved in *NLRB v. Wyman-Gordon Co.*, *supra*, rejecting the notion that such a requirement was somehow unlawful: "The respondent [employer] also argues that it need not obey the Board's order because the requirement of disclosure of employees' names and addresses is substantively invalid. This argument lacks merit." *Id.*, 394 U.S. at 767. One challenge rejected by the Court was that the provision of names and addresses would violate § 302. *See* Brief for Wyman-Gordon Company to the Supreme Court, *NLRB v. Wyman-Gordon Co.* (No. 463), 1969 WL 120290, at 38-44; *Wyman-Gordon Co. v. NLRB*, 397 F.2d 394, 396 (1st Cir. 1968) ("[W]e are not greatly impressed by the contention that compelling a list of names and addresses forces appellant . . . to give a 'thing of value' to a labor organization, in violation of 29 U.S.C. § 186.").

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[8] Even prior to this, unions and employers negotiated contract provisions requiring employers to provide information. Prentice-Hall, at ¶ 56,754.6 (companies agree with United Auto Workers to provide lists of employee names and addresses).

A union is also entitled to get employee information – including names and addresses – from an employer pursuant to the bargaining duty imposed once a union is recognized as the employees' collective-bargaining representative. This was the law before enactment of § 302. *Aluminum Ore Co. v. NLRB*, 131 F.2d 485, 487 (7th Cir. 1942) (enforcing Board order requiring employer to provide names, classifications and wages; rejecting employer's argument that the information was confidential). It has never been doubted since then. *See Yawman & Erbe Mfg. Co.*, 89 NLRB 881, 882-883 (1950), *enf'd* 187 F.2d 947 (2d Cir. 1951); *Verona Dyestuff Division Mobay Chemical Corp.*, 233 NLRB 109, 112 (1977); *Beverly Health & Rehab. Svs.*, 346 NLRB 1319, 1326-1327 (2006). There is no exemption under § 302(c) for providing this information. Indeed, *all* information an employer is required to give a union as part of the bargaining process under the Court's decision in *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149, 153-154 (1956) has some "value." Yet that obligation – not one expressed in the statute but drawn from the general duty to bargain – is not made an exemption under § 302(c).

There is a free speech aspect to this issue, as well. Employers have a right under the First Amendment to convey information. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 & n.7 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 764-765 (1976). This should include employees' names and addresses, which are simply information. "Even

dry information, devoid of advocacy, political relevance, or artistic expression, has been accorded First Amendment protection." *University City Studios v. Corley*, 273 F.3d 429, 446 (2d Cir. 2001). In addition to being information in itself, a list of names and addresses has only one purpose: to enable further speech. Giving information to unions is of course protected speech, but so are invitations to hear such speech. *Thomas v. Collins*, 323 U.S. 516, 534 (1945).

By holding that agreements for employer neutrality, worksite access, and the provision of employee lists may be the "payment" of "things of value," the Eleventh Circuit calls into question decades of settled precedent. This shows how much its decision is at odds with the structure of the LMRA.

VI. MULLHALL'S THEORY AND THE COURT OF APPEALS' DECISION WOULD DESTABILIZE OTHER IMPORTANT AREAS OF LABOR LAW.

A. Voluntary Recognition Is The Only Purpose Of The Challenged Provisions And Is Threatened.

Voluntary recognition is the very object of the neutrality agreement. The agreement does not confer recognition on the union as the bargaining agent of any employees and does not entitle the union to receive dues or any other payments from employees. It only provides a process through which a union might in the future obtain the support of a majority of the employees and gain recognition. *Hotel Employees*

Local 217, 996 F.2d at 566; *New Otani Hotel*, 331 NLRB 1078, 1080-1081 (2000). The agreement's provisions allowing facility access, promising employer neutrality, and entitling the union to employee names and addresses are only means to the end. They have no independent benefit or value to a union.

The complaint does not allege that the employer's promise to recognize the union upon a showing a majority status violates § 302, and the Eleventh Circuit did not so find. Surely, this is because the law is so clear that this has always been allowed under the NLRA. A union must show the support of a majority of employees before it may be recognized as the exclusive representative. *ILGWU v. NLRB* (*Bernhard-Altmann Texas Corp.*), 366 U.S. 731, 738 (1961). This requirement may be satisfied by the union's presentation of authorization cards signed by a majority of employees. This Court stated in *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 600 (1969), "In short, we hold that the 1947 amendments did not restrict an employer's duty to bargain under Section 8(a)(5) solely to those unions whose representative status is certified after a Board election." The Court thoroughly analyzed the issue and concluded that union authorization cards could lawfully be used to support recognition. 395 U.S. at 595-600 & n.17; *see Bernhard-Altmann*, 366 U.S. at 739 ("If an employer takes reasonable steps to verify union claims [of majority status] . . . he can readily ascertain their validity and obviate a Board election."); *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 280 (1973); *NLRB v.*

Broad Street Hosp. & Med. Ctr., 452 F.2d 302, 305 (3d Cir. 1971) ("Voluntary recognition by employers of bargaining units would be discouraged, and the objectives of our national labor policy thwarted, if recognition were to be limited to Board-certified elections. . . ."); *NLRB v. Lyon & Ryan Ford, Inc.*, 647 F.2d 745, 750 (7th Cir. 1981) ("An employer's voluntary recognition of a majority union remains 'a favored element of national labor policy.'") (internal citation omitted), *cert. denied*, 102 S.Ct. 391 (1981); *see* § 9(c)(1)(A)(i) of the NLRA, 29 U.S.C. § 159(c)(1)(A)(i) (employees may file a petition for an election if "their employer declines to recognize their representative.")

One of the authors of the Taft-Hartley Act explained how he expected an employer to react to a union claim of majority status:

> . . . When approached by a union organizer with a demand for recognition, would it not be logical to suppose that [management] would first demand proof of a majority organization and recognize the union as the collective bargaining representative of his employees only when furnished with such proof?
>
> Why should it be necessary to continue the elaborate, costly, and confusing processes of the National Labor Relations Board, with its thousands of employees both in Washington and throughout the country, in examining, questioning, and determining in each instance which labor organizer has the

> confidence of a majority of the employees of every individual plant in the nation?
>
> Sometime, somewhere, our Federal government must make a start at retrenching.

Fred A. Hartley, OUR NEW NATIONAL LABOR POLICY 188 (1948).

The complaint and the Eleventh Circuit's decision divorce specific provisions of the neutrality agreement from the agreement's purpose. The provisions of the neutrality agreement that the Eleventh Circuit found potentially criminal under § 302 are simply means to the end of voluntary recognition. If these provisions are the illegal payment of things of value under § 302, then so must the voluntary recognition requirement at the agreement's heart. But there is no room in decades of established case law for Mulhall's assertion that an agreed-upon process for fostering voluntary recognition should suddenly be regarded as criminal.

Accepting the Eleventh Circuit's reasoning would revolutionize, and upset, the fundamental understanding of the recognition process under the NLRA that has persisted since its enactment and through the Taft-Hartley amendments and the LMRDA.

B. The Decision Below Would Also Open The Way For § 8(a)(2) Employer-Assistance Charges To Become Court Cases, And For A New, More Intrusive Standard In Duty Of Fair Representation Cases.

Section 8(a)(2). Like § 302, LMRA § 8(a)(2), 29 U.S.C. § 158(a)(2), prohibits an employer from making a "contribution of financial or other support" to a labor organization, but courts have refused to read "other support" literally.

> (Literally, . . . almost any form of employer cooperation, however innocuous, could be deemed 'support' or 'interference.' Yet such a myopic view of § 8(a)(2) would undermine its very purpose and the purpose of the [NLRA] as a whole – fostering free choice – because it might prevent the establishment of a system the employees desired. Thus, the literal prohibition of § 8(a)(2) must be tempered by recognition of the objectives of the NLRA.)

Hertzka & Knowles v. NLRB, 503 F.2d 625, 630 (9th Cir. 1974), *cert. denied*, 423 U.S. 875 (1975); *see Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999, 1015-1016 (9th Cir. 1990); *Chicago Rawhide Mfg. Co. v. NLRB*, 221 F.2d 165, 167 (7th Cir. 1955).

Mulhall's myopic theory would change all this and make an employer's violation of § 8(a)(2) of the NLRA into a § 302 violation. Mulhall asserts that anything an employer gives a union that is helpful for organizing violates § 302. J.A. 102 ("enforcing § 302

with respect to organizing assistance cannot possibly conflict with the NLRA"), 104 ("enforcing § 302 against 'thing[s] of value' useful for organizing causes no absurd results"). An employer obviously gives something to a "labor organization" that is "useful" to organizing when it violates § 8(a)(2) in respect to that union. Accepting Mulhall's view would open up an entirely new avenue for redressing § 8(a)(2) violations: suits under § 302(e) and even under the RICO statute, given that § 302 violations are RICO predicate offenses, 18 U.S.C. § 1961(1)(C).

Section 8(a)(2) violations occur in a wide variety of forms, including some types of employee committees that are considered "labor organizations." *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 212-213 (1959); *Electromation, Inc.*, 309 NLRB 990, 997-998 (1992), *enf'd* 35 F.3d 1148 (7th Cir. 1994). Employer discrimination between unions with respect to such things as access for organizing have always been dealt with only by the NLRB in its enforcement of § 8(a)(2). *See, e.g., Kosher Plaza Supermarket*, 313 NLRB 74, 85 (1993). This would no longer need be the case, as employees and unions took to the courts for potentially faster and more powerful injunctive relief, circumventing the NLRB's control of injunctive relief against unfair labor practices under § 10(j) of the NLRA, 29 U.S.C. § 160(j). Mulhall has not suggested any limitation on his theory that would avoid this result.

Duty of Fair Representation. The Eleventh Circuit's approach is much more indefinite than Mulhall's simple analysis but also has the potential to

do serious mischief to the collective-bargaining process. The Court of Appeals instructed the district court to conduct a search into whether "innocuous ground rules" were part of a "corrupt scheme" that the complaint did not allege and the court did not describe even hypothetically. Pet. App. 8, 9. Law settled for decades provides a means for employees unhappy with collective bargaining agreements, strike settlements, grievance settlements, and other labor-management agreements to attack them but imposes a standard that prevents undue disruption. *Airline Pilots Association v. O'Neill*, 499 U.S. 65, 78 (1991) (a "wide range of reasonableness" is given to unions negotiating these agreements). The Eleventh Circuit's decision would create the opportunity to recast a duty of fair representation claim as a § 302 case and open the way for investigatory discovery into the reasons why an employer and a union made an otherwise "innocuous" agreement.

VII. THE UNION LOBBIED FOR LEGISLATION ENABLING THE EMPLOYER TO CREATE THE BUSINESS COVERED BY THE AGREEMENT: THIS IS COOPERATION THAT LABOR LAW ENCOURAGES AND CANNOT SUPPORT MULHALL'S § 302 THEORY.

The Eleventh Circuit apparently found it potentially "corrupt" that the union and employer worked together to pass mutually beneficial legislation. Pet. App. 3, 8. The Court therefore remanded so the district court could "determine why Unite and Mardi

Gras agreed to cooperate with one another." Pet. App. 9. But there was nothing corrupt or hidden involved; cooperation between employers and unions is at the heart of the LMRA.

The allegation in Paragraph 11 of the complaint that the union "agreed to expend monetary and other resources to support a ballot proposition favored by Mardi Gras" does not meet *Iqbal* standards. *Ashcroft v. Iqbal*, *supra*, 556 U.S. 662; *see Mulhall II*, Pet. App. 11-12 (Restani, J., dissenting). No facts were alleged to support this conclusion. It is belied by the text of the neutrality agreement itself. Paragraph 15 of the agreement states that it would be in effect "for 4 years from the installation of the first slot machine, Video Lottery Terminal or similar gaming device at the gaming facility" and the agreement "is not in effect if slot machines, Video Lottery Terminals or similar gaming devices are not installed and open to the public at the gaming facility." Pet. App. 85. This condition was explicit, not hidden, and was entirely logical and benign. It was in the union's *self-interest* to lobby for legalization of slot machines. If successful, which it was, the agreement would become effective and the employer would let the union *try* to organize its employees without hindrance. The union would not have violated the agreement if it refrained from campaigning, and the agreement would have become effective even if the law passed without the union's help.

There is no question, however, that the union wanted the neutrality agreement enough to give up

its right to take economic action against the employer, which was made an explicit, enforceable condition in the neutrality agreement. Nor is there any question that the union desired the neutrality agreement enough to expend resources helping Mardi Gras get into the casino business. The question under § 302, however, is not whether the union wants something from the employer but whether it is the type of thing that Congress intended to stop. Sixty-five years of jurisprudence before the Eleventh Circuit's decision shows the opposite: this kind of agreement is something the NLRA encourages.

The NLRA was designed to promote labor-management cooperation. Its policy is "encouraging the practice and procedure of collective bargaining." 29 U.S.C. § 151. "The central purpose of the Act was to protect and facilitate employees' opportunity to organize unions to represent them in collective-bargaining negotiations." *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 609 (1991); *see Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785 (1996) ("The object of the National Labor Relations Act is industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes between workers and employers."); *see also* Labor Management Cooperation Act, 29 U.S.C. § 175a. Neutrality agreements are a prominent way of accomplishing this. *Dana Corporation*, 356 NLRB No. 49 (2010), *slip op.* at 7-8, *enf'd* 698 F.3d 307 (6th Cir. 2012).

The notion that unions and employers commit criminal offenses by helping each other is antithetical to the NLRA's basic premise. The employer always receives consideration for a neutrality agreement. The one here, like those in all the court and NLRB cases on the subject, has a prohibition against picketing and other disruptive labor actions – valuable consideration for a fledgling business. The existence of such consideration does not make a neutrality agreement illegal. This makes it enforceable under the common law of contracts and under § 301(a). *Lion Dry Goods*, 368 U.S. at 28.

If it is sound logic that a union's help for the employer's business can make a labor-management agreement criminal, then a new era of labor relations is ushered in. Unions try to help their employers all the time, and, of course, they expect benefits in return, both in the form of more and better jobs for their members (or at least not losing them) and in a cooperative attitude in collective bargaining. When they do so by lobbying for mutually beneficial legislation, their conduct is not unlawful; it is protected by the Petition Clause. *United Mine Workers v. Pennington*, 381 U.S. 657, 669-670 (1965) (joint union-employer lobbying for minimum wage that would favor large employers signed to union's agreement could not violate antitrust law, following *Eastern R. Conf. v. Noerr Motors*, 365 U.S. 127, 137-138 (1961)); *Brown & Root, Inc. v. Louisiana State AFL-CIO*, 10 F.3d 316, 325-326 (5th Cir. 1994) (First Amendment barred LMRA § 303 challenge to unions'

lobbying for legislation sought by company in return for dismissal of nonunion subcontractor); *Franchise Realty Interstate Corp. v. San Francisco Local Jt. Exec. Bd. of Culinary Workers*, 542 F.2d 1076, 1080 (9th Cir. 1976) (joint lobbying by restaurant association and labor union protected under *Noerr-Pennington* doctrine); *see also Nevada Com'n on Ethics v. Carrigan*, 564 U.S. ___, 131 S.Ct. 2343, 2353 (2011) (Kennedy, J., concurring) ("Just as candidates announce positions in exchange for citizens' votes, so too citizens offer endorsements, advertise their views, and assist political campaigns based upon bonds of common purpose. These are the mechanisms that sustain representative democracy.") (internal citation omitted). Once again, the Eleventh Circuit's approach proves too much. If an otherwise lawful labor-management agreement can be tainted by a union's lobbying for mutually beneficial legislation, why not a collective bargaining agreement or any other form of labor-management cooperation?

Because the whole purpose of the neutrality agreement here is to foster the aims of the NLRA – the avoidance of labor disputes, labor-management cooperation, and the promotion of collective bargaining and arbitration – the agreement cannot be condemned by § 302.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

RICHARD G. MCCRACKEN
Counsel of Record
ANDREW J. KAHN
PAUL L. MORE
DAVIS, COWELL & BOWE LLP
595 Market Street, Suite 1400
San Francisco, CA 94105

August 15, 2013

STATUTORY APPENDIX

29 U.S.C. § 186. Restrictions on Financial Transactions*

(a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

It shall be unlawful for any employer *or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer* to pay, *lend*, or deliver, or agree to pay, *lend*, or deliver, any money or other thing of value –

(1) to any representative of any of his employees who are employed in an industry affecting commerce; *or*

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such

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* Unless otherwise indicated, the provisions of § 302 contained in the LMRA are in century type; additions to those sections made by the LMRDA appear in italics. Deletions resulting from the LMRDA amendments and subsequent amendments have been omitted.

employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) Request, demand, etc., for money or other thing of value

(1) It shall be unlawful for any *person to request, demand,* receive, or accept, or agree to *receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a)* of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in section 13102 of Title 49)[†] *employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the*

[†] Parenthetical phrase amended by Pub. L. 104-88, 104th Cong., 1st Sess., 1995, 109 Stat. 803.

unloading, of the cargo of such vehicle: Provided, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) Exceptions

The provisions of this section shall not be applicable (1) *in* respect to any money or other thing of value payable by an employer *to* any *of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization,* who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the

termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on

petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; *(6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds*; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, (B) child care centers for preschool and school age dependents of employees, or (C) financial assistance for employee housing: Provided, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: Provided further, That

the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds;[7] (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: Provided further, That no such legal services shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959;[8] or (9) with respect to money or other things of value paid by an employer to a plant, area or industrywide labor management committee established for one or

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[7] Clause (7) of § 302(c) was originally added by Pub. L. 91-86, 91st Cong., 1st Sess., 1969, 83 Stat. 133, and subsequently amended.

[8] Clause (8) of § 302(c) was originally added by Pub. L. 93-95, 93rd Cong., 1st Sess., 1973, 87 Stat. 314, and subsequently amended.

more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978.**

(d) Penalties for violations††

(1) Any person who participates in a transaction involving a payment, loan, or delivery of money or other thing of value to a labor organization in payment of membership dues or to a joint labor-management trust fund as defined by clause (B) of the proviso to clause (5) of subsection (c) of this section or to a plant, area, or industry-wide labor-management committee that is received and used by such labor organization, trust fund, or committee, which transaction does not satisfy all the applicable requirements of subsections (c)(4) through (c)(9) of this section, and willfully and with intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment, loan, money, or other thing of value under subsections (c)(4) through (c)(9) violates this subsection, shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not

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** Clause (9) of § 302(c) was added by Pub. L. 95-524, 95th Cong., 2d Sess., 1978, 92 Stat. 1909.

†† Clause (d) of Section 302 was amended to current form by Pub. L. 98-473, 98th Cong., 2d Sess., 1984, 98 Stat. 1837.

more than $10,000, or imprisoned for not more than one year, or both.

(2) Except for violations involving transactions covered by subsection (d)(1) of this section, any person who willfully violates this section shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than $10,000, or imprisoned for not more than one year, or both.

(e) Jurisdiction of courts

The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of chapter 6 of this title.

(f) Effective date of provisions

This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Contributions to trust funds

Compliance with the restrictions contained in subsection (c)(5)(B) of this section upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) of this section be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

RESPONDENT'S BRIEF

RECORD AND BRIEFS

Nos. 12-99, 12-312

Supreme Court, U.S.
FILED
NOV 21 2012
OFFICE OF THE CLERK

In The
Supreme Court of the United States

UNITE HERE LOCAL 355,

Petitioner,

v.

MARTIN MULHALL; HOLLYWOOD GREYHOUND TRACK, INC. d/b/a/ MARDI GRAS GAMING,

Respondents.

MARTIN MULHALL,

Petitioner,

v.

UNITE HERE LOCAL 355; HOLLYWOOD GREYHOUND TRACK, INC. d/b/a/ MARDI GRAS GAMING,

Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

UNITE HERE LOCAL 355's RESPONSE TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

RICHARD G. MCCRACKEN*
ANDREW J. KAHN
PAUL L. MORE
DAVIS, COWELL & BOWE LLP
595 Market Street, Suite 1400
San Francisco, CA 94105
(415) 597-7200
rmccracken@dcbsf.com

Counsel for Respondent UNITE HERE Local 355

**Counsel of Record*

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COUNTER-STATEMENT OF QUESTION PRESENTED

Are an employer's promise of neutrality during a union organizing campaign; an employer's grant of limited access to non-work areas of its facility for the purpose of organizing; and the names, addresses, and classifications of an employer's employees "other things of value" that an employer is prohibited from "delivering" by § 302 of the Labor-Management Relations Act, 29 U.S.C. § 186?

CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit were Plaintiff and Cross-Petitioner Martin Mulhall, Defendant and Respondent UNITE HERE Local 355 (the "union"), and Co-defendant and Respondent Hollywood Greyhound Track, Inc. d/b/a Mardi Gras Gaming ("Mardi Gras" or the "employer"). None of these parties is either publicly held or affiliated with an entity that is so held.

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STATEMENT OF THE CASE

UNITE HERE Local 355 and Mardi Gras entered into a Memorandum of Agreement (the "neutrality agreement") covering ground rules for any organizing drive that the union led among Mardi Gras's employees. The neutrality agreement does not contain any substantive terms or conditions of employment for Mardi Gras employees. Its purpose is to "ensur[e] an orderly environment for the exercise by the Employees of their rights under Section 7 of the National Labor Relations Act and to avoid picketing and/or other economic action directed at the Employer in the event the Union decides to conduct an organizing campaign among Employees." App. 79.

If the union seeks to organize Mardi Gras employees, the agreement requires Mardi Gras to provide union representatives limited access to its property. More specifically, "[t]he Union may engage in organizing efforts in non-public areas of the gaming facility during Employees' non-working times (before work, after work, and during meals and breaks) and/or during such other periods as the parties may mutually agree upon." App. 80. Mardi Gras also agreed to "furnish the Union with a complete list of Employees, including both full- and part-time employees, showing their job classifications, departments and addresses." App. 81. Mardi Gras agreed to "take a neutral approach to unionization of Employees" and not to "do any action nor make any statement that will directly or indirectly state or

imply any opposition by the Employer to the selection by such Employees of a collective bargaining agent, or preference for or opposition to any particular union as a bargaining agent." App. 79.[1] Mardi Gras agreed to acknowledge the existence and terms of the neutrality agreement to its employees upon the union's request. App. 79. The agreement contains an agreed-upon method for determining whether a majority of the employees wish to be represented by the union ("card-check recognition"), and an arbitration clause for resolving any disputes that arise. App. 81, 84.

By its terms, the neutrality agreement does not give the union "possession" or "control over [Mardi Gras's] private property" or "control over its communications." *Cf.* No. 12-312, Cross-Pet., at 6. Mardi Gras simply agreed that it would exercise its First Amendment and statutory right to remain neutral toward any union organizing campaign, and that it would not exercise its state-law property right to exclude non-employee union organizers from its facilities, so long as these organizers followed agreed-upon ground rules.

The neutrality agreement also does not require the union to expend any resources supporting Mardi Gras's gaming operations. The agreement states that it will not go into "effect if slot machines, Video Lottery Terminals or similar gaming devices are not

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[1] The union agreed not to "coerce or threaten any Employee in an effort to obtain authorization cards." App. 79.

installed and open to the public at the gaming facility." App. 85. Mulhall pled no facts to support the complaint's assertion that the union "agreed to expend monetary and other resources to support a ballot proposition favored by Mardi Gras." App. 66.

In his complaint, Mulhall alleges that the union demanded that Mardi Gras "deliver several 'things of value' to the union not permitted by [LMRA] § 302(c)." He characterizes these "things" as: "(1) information about nonunion employees; (2) access and use of the employer's property for organizing; and (3) control over the employer's communications with nonunion employees." App. 63. The complaint makes no allegation that the union demanded any "payment" or "loan." *See* App. 66, 67, 70, 74.

In reversing the district court's dismissal of this complaint, the Eleventh Circuit concluded that "intangible organizing assistance cannot be loaned or delivered because the actions 'lend' and 'deliver' contemplate the transfer of tangible items." App. 7. Because Mulhall's complaint alleges only that the union demanded the "delivery" of "other things of value," the majority's conclusion should have ended its analysis and it should have upheld the district court's decision. But the majority went on to decide that "intangible services, privileges, or concessions can be paid or operate as a payment" because "[w]hether something qualifies as a payment depends not on whether it is tangible or has monetary value, but on whether its performance fulfills an obligation." App. 8. The majority did not seek to square this conclusion

with the opinions of the other courts to address the issue – including the Third and Fourth Circuits – all of which have held that organizing ground rules like the ones here are not "things of value" that may be "paid, loaned, or delivered" within the meaning of § 302.

The majority decided that "innocuous ground rules can become illegal payments if used as valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer." App. 8. But the court did not explain how the parties' neutrality agreement could be held to corrupt union representatives or extort any improper benefit from an employer. *See* App. 11-12 (Restani, J., dissenting).

The union asks this Court to review the Eleventh Circuit's decision, which conflicts with long-standing interpretation of the Labor-Management Relations Act ("LMRA") and with other circuit courts' application of § 302 to neutrality agreements. The question presented is whether it violates § 302 for an employer to agree to remain neutral during union organizing and to grant union representatives limited access to the employer's property and employees, in return for the union's promise not to strike, picket, boycott or otherwise put pressure on the employer. Pet., at i-ii.

Mulhall filed a response to the petition for certiorari, agreeing that it should be granted. He acknowledged that the Eleventh Circuit's decision conflicts directly with those of the Third and Fourth Circuits. Resp., at 5. He claims, however, that there is also a

circuit split between the Third and Fourth Circuits' application of § 302 to neutrality agreements like the one here and circuit courts' interpretation of various unrelated federal statutes, such as the statute governing the conversion of government property, 18 U.S.C. § 641, and the statute criminalizing the use of mails for extortion, 18 U.S.C. § 876. Resp., at 5-7. Mulhall argues that criminalization of neutrality agreements like this one is necessary because "[a] union sacrificing employee interests at the bargaining table in order to satiate its self-interest in gaining more dues-paying members is . . . one of the harms that § 302 exists to prevent." Resp., at 15.

Mulhall also filed a cross-petition for writ of certiorari. In it, he argues that this Court should review the broad question of whether "intangible things" can be "deliver[ed]" under § 302. No. 12-312, Pet., at i. Mulhall argues that the term "deliver" – as used in § 302 – includes the "delivery" of intangibles such as neutral speech and the use of property. In support, he cites two dictionaries' definitions of the verb "to deliver" as including the "giving or yielding possession or control of something to another." No. 12-312, Pet., at 6.

The union waived its right to respond to the cross-petition. Notwithstanding this waiver, on October 24, 2012, the Court directed that the union respond.

REASONS FOR GRANTING THE WRIT

I. The Union's Writ Petition Encompasses the Meaning of the Term "Deliver" in § 302.

The question on which Mulhall cross-petitions – whether "intangibles" may be "deliver[ed]" within the meaning of § 302 – is subsumed in the question on which the union seeks review in No. 12-99. The union does not oppose the cross-petition, but believes that the scope of the question Mulhall presents is too broad. The Eleventh Circuit did not hold that "intangibles" generally are proscribed by § 302, but that three specific forms of intangibles may be: employer speech that is neutral toward unionization; limited access to an employer's facility for the purpose of communicating with employees; and the names, addresses, and classifications of those employees.

As explained below, the Eleventh Circuit's conclusions were incorrect and destabilizing. This is so regardless of whether the employer's promises are characterized as a "payment" or a "delivery."

II. The Eleventh Circuit's Decision Is Incompatible with the LMRA's Language and Structure.

A. The Eleventh Circuit's decision conflicts with those of other circuits and threatens to wreak havoc on established federal labor law.

The union and Mulhall agree that the petition in No. 12-99 should be granted. The Eleventh Circuit's

decision is directly at odds with those of the Third and Fourth Circuits, as well as the decisions of all of the district courts that have addressed the issue. The Third Circuit held that accepting the same argument that Mulhall makes here would "wreak havoc on the carefully balanced structure of the laws governing recognition of and bargaining with unions." *Hotel Employees Local 57 v. Sage Hospitality*, 390 F.3d 206, 219 (3d Cir. 2004). The Fourth Circuit "agree[d] with the Third Circuit that an agreement setting forth ground rules to keep an organizing campaign peaceful does not involve the delivery of a 'thing of value' to a union." *Adcock v. Freightliner LLC*, 550 F.3d 369, 376 (4th Cir. 2008). It held that "[b]y no stretch of the imagination are the [agreement's] concessions a means of bribing representatives of the Union[.]" *Id.*

The Eleventh Circuit's position is incompatible with long-standing federal labor law doctrines. This Court and every circuit court addressing the issue has held that agreements between employers and non-incumbent unions governing procedures for future organizing and recognition – and including provisions like the ones at issue here – are lawful and enforceable under LMRA § 301, 29 U.S.C. § 185. *See Retail Clerks v. Lion Dry Goods*, 369 U.S. 17, 28 & n.4 (1962); Pet., at 13 (listing cases). Since the union filed its writ petition, the Sixth Circuit upheld another neutrality agreement containing access and neutrality provisions similar to those here. *Montague v. NLRB*, ___ F.3d ___, 94 L.R.R.M. (BNA) 2106, 2012 WL 3608594 (6th Cir. August 23, 2012).

Section 302 was adopted at the same time as § 301. But according to the Eleventh Circuit, agreements that have long been held enforceable under § 301 are nonetheless criminal under § 302. This reading of the LMRA is impossible.

Each of the neutrality agreement's specific provisions that the Eleventh Circuit held criminal also has a well-established place in labor-management relations. Pet., at 16-22. Employers have a First Amendment and statutory right to speak during organizing campaigns, which includes the right to remain neutral or silent. 29 U.S.C. § 158(c); *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 67 (2008); *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469, 477 (1941). But according to the Eleventh Circuit, an employer commits a federal crime if its neutrality is seen as "fulfill[ing] an obligation" to a union. App. 8. Under the Eleventh Circuit's standard, what rational businessperson would risk stiff fines and jail time, *see* 29 U.S.C. § 186(d)(2), by remaining neutral towards unionization, rather than actively opposing it?[2] This

[2] Not to worry, the Eleventh Circuit majority says, an employer will only be prosecuted for failing to disparage a union if its neutrality is an "improper payment" and part of a "scheme to corrupt a union." App. 8, 9. But the court did not identify any "corrupt scheme" here or explain how to distinguish a "proper" from an "improper" "payment of neutrality" – a distinction about which § 302's text says nothing. *Cf. United States v. Poindexter*, 951 F.2d 369, 378 (D.C. Cir. 1991) ("We must acknowledge that, on its face, the word 'corruptly' is vague; that is, in the absence of some narrowing gloss, people must 'guess at its meaning and differ as to its application.'"). The majority hardly answers the serious constitutional problem created by defining an employer's neutrality to be a "thing of value" under § 302.

Court has read broad language in the NLRA and LMRA narrowly to avoid First Amendment problems far less grave than the Eleventh Circuit's content-based criminalization of speech under § 302. *See BE&K Construction Co. v. NLRB*, 536 U.S. 516, 535-36 (2002); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002) ("[A] law imposing criminal penalties on protected speech is a stark example of speech suppression.").

An employer's agreement to forego its state-law property right to exclude union representatives from its facility also has a time-honored place in labor-management relations. *See Facet Enters., Inc. v. NLRB*, 907 F.2d 963, 983 (10th Cir. 1990) (plant access among the "important areas of labor-management relations"); Pet., at 16-17 n.2. Clauses permitting union representatives to access employees during non-work times are a common feature of collective-bargaining agreements; indeed, they are a mandatory subject of bargaining. *Arizona Portland Cement Co.*, 302 N.L.R.B. 36, 44 (1991). Such clauses naturally benefit unions: they reduce the cost of enforcing contracts and maintain employee goodwill.[3] If made

[3] In "right-to-work" states, such goodwill may translate into a greater number of dues-paying union members, something that Mulhall sees as anathema to the LMRA. Resp., at 15; *see* 29 U.S.C. § 164(b). In fact, courts have rejected the distinction between access rights "benefiting employees" and access rights "benefitting unions" that Mulhall seeks to draw. *Beverly Health v. NLRB*, 317 F.3d 316, 322 (D.C. Cir. 2003); *cf.* Resp., at 13.

part of a labor-management agreement enforceable under LMRA § 301 – including an agreement involving a non-incumbent union like the one upheld in *Lion Dry Goods*, 369 U.S. at 20 & n.4 – they "fulfill an obligation" to a union. Under the Eleventh Circuit's view, then, this common, salutary aspect of labor-management relations is in fact criminal.

The neutrality agreement also requires that Mardi Gras provide the union with the names, addresses and classifications of its employees. The purpose of this requirement is the same as that supporting the similar obligation in *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1240, 1243 (1966) – to open up lines of communication with employees and to ensure that disputes about voting eligibility and bargaining-unit composition may be addressed quickly. This Court has already rejected the notion that requiring an employer to provide employee names and addresses to a union violates § 302. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969); *Wyman-Gordon Co. v. NLRB*, 397 F.2d 394, 396 (1st Cir. 1968). And it has long been the law that employers must provide the same information – and many other types of information as well – as part of their statutory bargaining obligation and pursuant to

collective-bargaining agreements. Pet., at 21; *NLRB v. ACME Indus. Co.*, 385 U.S. 432, 435-36 (1967).[4]

The black-hole implications of the Eleventh Circuit's decision become clear when it is applied to collective-bargaining agreements. Collective-bargaining agreements generally include clauses like those at issue here and are themselves obviously "valuable" to unions. If a neutrality agreement containing an employer's commitment to non-disparagement, plant access, and providing employee information is a "thing of value" under § 302 – and a "payment" since those commitments are contractual consideration and "fulfill an obligation" to a union – then why not a collective-bargaining agreement? This question reveals the deeply flawed nature of Mulhall's argument.

Collective-bargaining agreements are of clear value to unions – to argue otherwise would be to deny the obvious. *Cf.* Resp., at 10. They are sometimes "bought" with labor peace. Employers often do not enter into them willingly, but only in exchange for the

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[4] According to Mulhall, an employer risks criminal sanctions unless it first refuses to provide the information, then defends a meritless case before the National Labor Relations Board ("NLRB"), and then waits for the NLRB to enforce its order compelling the employer to provide the information in federal court, thus triggering the exception set forth in § 302(c)(2), 29 U.S.C. § 186(c)(2), for payments in satisfaction of the "judgment of any court." Resp., at 16 n.10. This is a curious view of labor-management cooperation and the appropriate role of the federal judiciary.

end to a strike or boycott, and only on the condition that the union waive its right to take economic action through a no-strike clause. *Cf.* Resp., at 12. Unions expend significant financial resources in securing collective-bargaining agreements – on organizers, negotiators, strike funds, lawyers, public relations campaigns, political lobbying – which, according to the Eleventh Circuit, demonstrates that they have monetary value to a union. *See* App. 8. Section 302(c) contains no exemption for collective-bargaining agreements generally – or for garden-variety clauses that benefit unions, like those mandating plant access, exclusive grievance rights,[5] union security,[6] and successorship.[7] Under the Eleventh Circuit's view, an employer agreeing to – or a union merely demanding – these provisions is criminal.

Mulhall recognizes that his expansive definition of the "delivery" or "payment" of a "thing of value" under § 302 leads to this dead end. *See* Resp., at 14 &

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[5] *See Vaca v. Sipes*, 386 U.S. 171, 191-92 (1967). Collective-bargaining agreements typically grant the union – not employees – the exclusive right to file and pursue employee grievances.

[6] Clauses that require employees to become "member[s]" of a union as a condition of employment are mandatory subjects of bargaining. 29 U.S.C. § 158(a)(3); *Marquez v. Screen Actors Guild*, 525 U.S. 33, 37 (1998); *NLRB v. General Motors Corp.*, 373 U.S. 734, 735 (1963).

[7] Clauses maintaining the union's status as the exclusive collective-bargaining representative after a change in ownership are a mandatory subject of bargaining. *United Mine Workers (Lone Star Steel Co.)*, 231 N.L.R.B. 573, 574-75 (1977), *enf. in rel. part*, 639 F.2d 545, 550-56 (10th Cir. 1980).

n.10. His only response is to spin out a series of policy arguments – against union "self-dealing for organizing assistance" and in favor of union bargaining after recognition; against a "private process" for organizing and in favor of "the NLRA's preferred organizing procedures"; against what Mulhall calls union "corporate campaigns" and in favor of what he calls a "'bottom-up' organizing process." Resp., at 13-17. These policy predilections find no support in labor case-law generally. *See infra*, Part III. They certainly are nowhere to be found in § 302's text.

B. Section 302's language does not support the Eleventh Circuit's rewriting of federal labor law.

The Third and Fourth Circuits both rejected the argument that anything of subjective value that a union receives from an employer – or which is of enough benefit that the union will expend resources securing it – is the proscribed payment or delivery of "money or other things of value." *Sage Hospitality*, 390 F.3d at 219 ("The agreement here involves no payment, loan, or delivery of anything. . . . [A]ny benefit to the union inherent in a more efficient resolution of recognition disputes does not constitute a 'thing of value' within the meaning of the statute."); *Adcock*, 550 F.3d at 374 ("Under the plain language of the statute, the concessions made by Freightliner in the Card Check Agreement do not involve the payment or delivery of a 'thing of value.' The concessions provided by Freightliner all involve permitting the

Union access to employees during an organizing campaign. Such concessions do not involve the delivery of either tangible or intangible items to the Union.").[8] To these courts, the statute's plain language foreclosed the argument that Mulhall makes here.

It is incongruous to read the phrase "money or other thing of value" to encompass concessions on neutral speech, plant access, and employee information contained in an otherwise valid labor-management agreement, particularly when those nouns are preceded by the verbs "pay, lend, or deliver." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) ("The maxim *noscitur a sociis*, . . . while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress"); *Norfolk & Western R. Co. v. Train Dispatchers*, 499 U.S. 117, 129 (1991) ("[W]hen a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration"). Congress's intent was to limit the term "money or other thing of value" to items having an ascertainable, market-based value. This intent is demonstrated by the statute's penalty provision, which distinguishes a felony violation from a misdemeanor based on the dollar "value of the

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[8] *See also Hotel Employees & Rest. Employees Union v. Sage Hospitality Res., L.L.C., Local 57*, 299 F.Supp.2d 461, 465 (W.D. Pa. 2003); *Patterson v. Heartland Indus. Partners, LLP*, 428 F.Supp.2d 714, 724 (N.D. Ohio 2006).

amount of money or thing of value" paid or demanded. *Adcock*, 550 F.3d at 375. Certainly, Congress did not intend that whether a criminal defendant went to prison for one or five years would hinge on the subjective value that a union placed on a concession contained in a labor-management agreement, or on the financial resources it expended to get an employer to make that concession. *See* 29 U.S.C. § 186(d)(2); *cf.* App. 8. The cases Mulhall cites finding a violation of § 302 involved the payment or delivery of something with an ascertainable, market-based value in this sense.[9]

Mardi Gras cannot be said to have "paid" neutral speech, permission to access its facility, or employee

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[9] In arguing otherwise, Mulhall engages in obfuscation. *NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849, 855-56 (5th Cir. 1986) did not involve the abstract "use of physical property," but whether a union official who was also an employee could be given employer-paid time to conduct union business – certainly a "payment" with ascertainable market value. *Cf.* Resp., at 6. *United States v. Schiffman*, 552 F.2d 1124, 1126 (5th Cir. 1977) did not involve an employer permitting union officials to use non-work areas of its property to talk with its employees. It involved a union's demand for hotel room rates $1,200 less than what the union would have paid under generally applicable corporate rates. *See also United States v. Douglas*, 634 F.3d 852, 858 (6th Cir. 2011) ("[I]t is somewhat laughable to argue that Douglas and Campbell did not demand a 'thing of value' when they demanded high-paying jobs for their cronies. The value of a job, especially one that pays $150,000 a year, is undeniable."); *United States v. Roth*, 333 F.2d 450, 452 (2d Cir. 1964) (holding, unremarkably, that no-interest, no-collateral loans in the amounts of $30,000, $54,000, and $12,000 fell within § 302's prohibition).

information to the union. Except to the extent that these concessions were consideration in an otherwise valid labor-management contract – in which the union made reciprocal promises, including the promise not to take economic action – there was no "payment" here in any sense at all. But accepting that anything of value that serves as consideration in a labor-management contract is a § 302 "payment" would invalidate LMRA § 301, which is predicated on this exchange of value. *See Lion Dry Goods*, 369 U.S. at 28; *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 248 (1970) (under LMRA § 301 "a no-strike obligation, express or implied, is the *quid pro quo* for an undertaking by the employer to submit grievance disputes to the process of arbitration.").

Nor did Mardi Gras "deliver" to the union neutral speech or use of its facility to talk with workers. Mulhall tortures the neutrality agreement's language beyond recognition when he argues that it "delivers" "control over [the employer's] property" – as would the "delivery" of a deed – or "control over its communications." *See* No. 12-312, Pet., at 6. Mardi Gras simply committed itself to remain neutral to any union organizing and agreed not to eject union representatives from its facility so long as they followed certain ground rules.

Even if § 302's plain language did not foreclose Mulhall's argument altogether – as the Third and Fourth Circuits held – the phrase "other thing of value" is potentially limitless, conceivably proscribing the exchange of "things" that are encouraged by the

same statute. The scope of the phrase is ambiguous, at the very least. *See Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("Ambiguity is a creature not of definitional possibilities but of statutory context[.]"). But if § 302's reach is ambiguous, then surely the courts should choose a construction of it that is not so far afield from the evils Congress said it was attacking, or so contrary to the LMRA's larger purposes. *See* Pet., at 7-11. This is particularly so because § 302 is a criminal statute. *Leocal v. Ashcroft*, 543 U.S. 1, 11, n.8 (2004) ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies."); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1336 (2011).

Because his theory is so at odds with the structure and purpose of the LMRA, Mulhall seeks to expand the interpretive field to completely unrelated federal statutes. Mulhall isolates the phrase "thing of value" and argues that it should be given the same meaning as similar phrases in federal laws as varied as those criminalizing the conversion of government property, 18 U.S.C. § 641; the use of mails to extort by means of threat to injure the property or reputation of the addressee, 18 U.S.C. § 876; and "falsely assum[ing] or pretend[ing] to be an officer or employee acting under the authority of the United States" in order to "demand[ ] or obtain[ ] any money, paper, document, or thing of value," 18 U.S.C. § 912. Resp., at 5 & n.3. The wildly disparate cases that Mulhall cites have no bearing on whether Congress intended

the organizing ground rules at issue here to be criminal "payment" of "money or other things of value." *Cf.* Resp., at 5-6, *citing United States v. Zouras*, 497 F.2d 1115, 1118, 1121 (7th Cir. 1974) (defendant's threat to publish nude photos of victim if she or her family testified against him violated 18 U.S.C. § 876); *United States v. Barger*, 941 F.2d 359, 367-68 (6th Cir. 1991) (Hell's Angel converted "record, voucher, money, or thing of value of the United States" in violation of 18 U.S.C. § 641 when he used confidential DEA intelligence briefing to target rival motorcycle gang); *United States v. Jeter*, 775 F.2d 670 (6th Cir. 1985) (conversion of carbon paper containing secret grand jury testimony on reputed drug dealers violated 18 U.S.C. § 641); *United States v. Marmolejo*, 89 F.3d 1185, 1191-92 (5th Cir. 1996) (sheriff and inmate properly prosecuted under 18 U.S.C § 666(a)(1)(B), where sheriff received $6,000 per month in exchange for allowing inmate unauthorized conjugal visits); *United States v. Collins*, 56 F.3d 1416, 1419 (D.C. Cir. 1995) (use of government computer and copy machine for creating competitive ballroom dancing materials could be "any thing of value" under 18 U.S.C. § 641, but should not have been prosecuted as conversion).

Isolating statutory terms in this manner and giving them generic meaning divorced from their context is not a recipe for sound statutory interpretation. *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) ("A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading

the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis."); *Boys Markets*, 398 U.S. at 250 ("Statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions.").

Leniency in prosecution, for example, may be a "thing of value" under a statute prohibiting public officers from being "influenced or rewarded in connection with any [public] business . . . involving *anything of value*[.]" 18 U.S.C. § 666(a)(1)(B); *United States v. Freeman*, 208 F.3d 332, 341-42 (1st Cir. 2000) (strip club owner's providing police officers with cash, free drinks and access to dancers' dressing rooms in exchange for police leniency violated 18 U.S.C. § 666(a)(1)(B)). But defining the identical term to include prosecutorial leniency makes no sense at all in a witness-tampering statute that prohibits public officials from "promis[ing] *anything of value* to any person, for or because of the testimony under oath or affirmation given or to be given by such person[.]" 18 U.S.C. § 201(c)(2); *United States v. Condon*, 170 F.3d 687, 689 (7th Cir. 1999) (Easterbrook, J.) ("Forgoing criminal prosecution (or securing a lower sentence) is not a 'thing of value' within the meaning of § 201(c)(2). . . . [T]reating immunity from prosecution (or a prosecutorial promise that would lead to a lower sentence) as a 'thing of value' would put § 201(c)(2) at war with a long history of lawful inducements to

testify – inducements that have been codified.") (internal citation omitted); *see id.* ("A court should not read ambiguous language to overturn an enduring system that has statutory support elsewhere.").

The Eleventh Circuit's definition of the "payment" of a "thing of value" puts § 302 at war with the LMRA's structure and purpose and with the long history of cooperative labor-management relations approved by the courts.

III. Section 302 Does Not Codify Mulhall's Labor Policy Preferences.

Mulhall presumably challenges the neutrality agreement under § 302 because he "vigorously opposes being unionized." *See* App. 35, 64. But making unionization more difficult to achieve is not § 302's purpose, nor is preventing a union from "satiat[ing] its self-interest in gaining more dues-paying members." Resp., at 15; *cf.* 29 U.S.C. § 151. Congress adopted § 302 to address the specific problems of "corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control." *Arroyo v. United States*, 359 U.S. 419, 425-26 (1959).

The complaint identifies no such corruption or bribery, nor did the Eleventh Circuit. The complaint alleges that:

> [u]nions have made, and are liable to make, wage, benefit, and other concessions at the expense of employees they exclusively represent in collective bargaining in exchange, *quid pro quo*, for things of value from employers that include lists of information about nonunion employees, the right to access and use nonunion properties and facilities, control over employer communications with nonunion employees, and other forms of valuable organizing assistance.

App. 72; *cf.* Resp., at 14-15. But even if this were the "bribery" that Congress meant to criminalize in § 302,[10] there is no allegation that the union traded employer neutrality and access rights for a "sweetheart deal"

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[10] Other, civil provisions of the Act protect employees against a union that compromises their employment terms and conditions. The NLRB interprets NLRA § 8(a)(2), 29 U.S.C. § 158(a)(2), to prohibit unions from negotiating substantive employment terms prior to being recognized as the exclusive representative. *Majestic Weaving Co.*, 147 N.L.R.B. 859 (1964). Once a union is recognized, it owes a duty of fair representation to all bargaining-unit employees, including on the contract terms it negotiates. *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 203 (1944); *NLRB v. Magnavox Co.*, 415 U.S. 322, 325 (1974). Unlike § 302, these doctrines involve the NLRB in setting national policy on the proper line between salutary labor-management cooperation and elicit collusion. "The availability of such adequate remedies severely undermines the . . . attempt to stretch § 302 beyond its limits." *Adcock*, 550 F.3d at 377.

on any ultimate collective-bargaining agreement. The neutrality agreement's terms disprove any such claim. App. 82.

Nor does the complaint allege facts to support Mulhall's view that the union "agreed to expend monetary and other resources to support a ballot proposition favored by Mardi Gras." App. 66; *see Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 677-79 (2009). The neutrality agreement does not contain any such promise. The agreement did not go into effect until Mardi Gras obtained certain gaming devices, so it was in the union's self-interest to support a ballot proposition making them legal. *See* App. 85. But even if the union had engaged in mutually beneficial political lobbying in return for employer concessions in the neutrality agreement, this would hardly be "corruption" or "bribery," unless the normal give-and-take of the political process is branded "corrupt." *See* Pet., at 28-29.

This case does not involve the question of whether "the NLRA's representational procedures" – including the secret-ballot elections authorized in § 9(c), 29 U.S.C. § 159(c) – should be "supplanted" by a neutrality agreement or card-check recognition. *Cf.* Resp., at 15. Mulhall does not challenge the neutrality agreement's provision for card-check recognition because it is clear that the NLRA permits this form of voluntary recognition. *See* Pet., at 23-25; Resp., at 16 n.12. Yet Mulhall argues at length that § 302 should be interpreted to prohibit neutrality agreements because they

"ban secret-ballot elections conducted by the National Labor Relations Board." Resp., at 15-16.

In fact, what Mulhall seeks is the codification in § 302 of his preferences on labor policy matters unrelated to § 302's purpose. The notion that Congress intended juries to settle these policy matters by applying a narrow, criminal anti-bribery statute is incredible. Mulhall's claim that § 302 is designed to protect "the NLRA's preferred organizing procedures" and "the NLRA's 'bottom-up' organizing process" – whatever those are supposed to be – only shows the mischief that the Eleventh Circuit's decision will be put to if allowed to stand.

CONCLUSION

For the foregoing reasons, the Court should grant the petition in No. 12-99 and grant the cross-petition in No. 12-312 on the narrower question stated at the outset of this response.

Respectfully submitted,

RICHARD G. MCCRACKEN
Counsel of Record
ANDREW J. KAHN
PAUL L. MORE
DAVIS, COWELL & BOWE LLP
595 Market Street, Suite 1400
San Francisco, CA 94105

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RESPONDENT'S BRIEF

RECORD AND BRIEFS

No. 12-99

Supreme Court, U.S.
FILED
SEP 20 2013
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In The

Supreme Court of the United States

UNITE HERE LOCAL 355,

Petitioner,

v.

MARTIN MULHALL, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT HOLLYWOOD GREYHOUND TRACK, INC.'S BRIEF

ROBERT L. NORTON,
Counsel of Record
ALLEN, NORTON & BLUE, P.A.
121 Majorca Avenue, Suite 300
Coral Gables, Florida 33134-4508
(305) 445-7801
rnorton@anblaw.com

BRIAN KOJI
ALLEN, NORTON & BLUE, P.A.
324 S. Hyde Park Avenue, Suite 225
Tampa, Florida 33606-4128
(813) 251-1210
bkoji@anblaw.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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QUESTION PRESENTED

Section 302(a)(2) of the Labor-Management Relations Act prohibits an employer "to pay, lend, or deliver, or agree to pay, lend or deliver, any money or other thing of value . . . to any labor organization . . . which represents or seeks to represent . . . any of the employees of such employer[.]" 29 U.S.C. § 186(a)(2). Likewise, Section 302(b)(1), makes it unlawful for a union "to request, demand, receive, or accept, or agree to receive or accept, any payment, loan or delivery of any money or other thing of value prohibited by [Section 302(a)(2)]."

The question presented is whether Section 302 prohibits a union from requesting and receiving a contract with an employer, whose employees it seeks to represent, whereby the union promises to contribute substantial money and other resources to support a ballot proposition favored by the employer and to refrain from picketing, boycotting or striking the employer, in exchange for the employer agreeing (1) to refrain from opposing the union's efforts to unionize its workforce; (2) to allow the union access to, and use of, non-public areas of its property to conduct its organizing activities; (3) to furnish the union monthly lists of its employees and their addresses to facilitate union organizing; (4) to voluntarily recognize the union as the exclusive representative of its employees based solely on authorization cards and without seeking a secret ballot election supervised by the NLRB;

QUESTION PRESENTED – Continued

and, (5) to agree to allow a third-party arbitrator to set the terms of a collective bargaining agreement establishing the wages, hours and terms and conditions of employment for its employees.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The parties in the proceedings before the Eleventh Circuit Court of Appeals were Petitioner UNITE HERE Local 355 ("Local 355"), Respondent Martin Mulhall, and Respondent Hollywood Greyhound Track, Inc. d/b/a Mardi Gras Gaming ("Mardi Gras").

Mardi Gras is not a publicly-held company. Its parent company is Hartman & Tyner, Inc.

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STATEMENT OF THE CASE

A. Background of Florida Gaming Law

Prior to 2004, the Florida Constitution prohibited the operation of Vegas-style slot machines throughout Florida. *See* Fla. Const. art. 10, § 7. In 2004, Florida voters amended the State's constitution to permit the voters of Broward and Miami-Dade counties to hold county-wide referendums on whether to authorize slot machines within existing licensed pari-mutuel facilities, including greyhound racing tracks. Fla. Const. art. 10, § 23(a). Subsequently, in 2005, the voters of Broward County approved ballot measures authorizing the operation of slot machines.

B. Complaint Allegations and Terms of the Memorandum of Understanding

Mardi Gras operates a greyhound racing track and casino in Hollywood, Florida. (Pet. App. 65).[1] Local 355 is a labor organization seeking to unionize and exclusively represent Mardi Gras' employees. (Pet. App. 65). Respondent Martin Mulhall is a 40-year Mardi Gras employee who opposes Local 355's efforts to become the exclusive representative of himself and other Mardi Gras employees. (Pet. App. 64-65).

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[1] References to materials contained in the Appendix to the Petition for Writ of Certiorari are designated as "Pet. App." and references to materials in the Joint Appendix are designated as "App."

Several months prior to the 2004 election, Mardi Gras and Local 355 entered into a contractual agreement whereby Local 355 agreed not to picket, boycott or strike Mardi Gras' facility and also to financially support the ballot initiatives that would permit Mardi Gras to offer slot machine gaming. (Pet. App. 65-66, 78-86). In exchange, Mardi Gras agreed, *inter alia*, to assist Local 355's efforts to organize its employees, to voluntarily recognize the union as the employees' representative based solely on signed authorization cards and to allow an outside arbitrator to set the wages and terms of employment of its employees. (Pet. App. 65-66, 78-86).

To this end, the Memorandum of Agreement entered into between Mardi Gras and Local 355 on August 23, 2004 (hereinafter referred to as the "Agreement"), required that Mardi Gras take a "neutral approach to unionization" in response to Local 355's efforts to unionize Mardi Gras employees. More specifically, the Agreement provided:

> The Employer will take a neutral approach to unionization of Employees. The Employer will not do any action nor make any statement that will directly or indirectly state or imply any opposition by the Employer to the selection by such Employees of a collective bargaining agent, or preference for or opposition to any particular union as a bargaining agent. Upon request of the Union, the Employer shall issue a written statement to the

> employees acknowledging this agreement and its terms.

(Pet. App. 79, ¶ 4).

In addition to refraining from opposing Local 355's organizational efforts, Mardi Gras also promised to afford Local 355 otherwise unavailable access to its employees and use of its facilities. (Pet. App. 80-81, ¶ 7). In this respect, the Agreement provided that Mardi Gras "shall provide access to its premises and to such Employees" and that "the Union may engage in organizing efforts in non-public areas of the gaming facility during Employees' non-working times[.]" The Agreement further mandated that Mardi Gras "furnish the Union with a complete list of Employees . . . showing their job classifications, departments and addresses." (Pet. App. 81, ¶ 8). Mardi Gras was also required to update the list on a monthly basis or as otherwise requested by Local 355. (Pet. App. 81, ¶ 8).

Significantly, the Agreement also required Mardi Gras to recognize Local 355 as the employees' exclusive representative based solely on signed authorization cards. (Pet. App. 81-82, ¶ 9). Under the terms of the Agreement, Mardi Gras is required to waive not only its statutory right to seek a secret ballot election supervised by the National Labor Relations Board, but also its statutory right to contest any unfair labor practices committed by Local 355 in obtaining the authorization cards. (Pet. App. 81-82, ¶ 9).

Finally, once Local 355 is recognized as the employees' exclusive representative, in the event that

Mardi Gras and Local 355 do not reach a mutual agreement within 150 days as to the employees' wages, hours and other terms and conditions of employment, the Agreement authorizes an outside arbitrator to set those terms. (Pet. App. 82, ¶ 10). This provision, typically referred to as an interest arbitration provision, is extremely broad and essentially allows an arbitrator to set all terms of employment for any Mardi Gras employee represented by Local 355, with the exception of employment terms governing retirement and profit-sharing. (Pet. App. 82, ¶ 10). In other words, if an outside arbitrator decided to immediately give a 50% raise to all bargaining unit employees, this provision would permit him or her to do so over Mardi Gras' objections.

In exchange for these commitments by Mardi Gras, Local 355 agreed that it would "not engage in a strike, picketing, or other economic activity at [Mardi Gras'] gaming facility[.]" (Pet. App. 82, ¶ 11). As alleged in the complaint, the *quid pro quo* for Mardi Gras' commitments also included an agreement by Local 355 "to expend monetary and other resources to support a ballot proposition favored by Mardi Gras." (Pet. App. 66). Indeed, in a related case in which Local 355 sued Mardi Gras for enforcement of the Agreement, Local 355 represented that "the time and money the Union and its members spent on the political campaign to obtain a [slot machine] gaming license for Mardi Gras" was "estimated at over $100,000[.]" (App. 24).

The Agreement between Mardi Gras and Local 355 was contingent on passage of the slot machine ballot initiatives and was thereafter effective "for 4 years from the installation of the first slot machine, Video Lottery Terminal or similar gaming device at the gaming facility[.]" (Pet. App. 85, ¶ 15).

Following passage of the ballot initiatives and Mardi Gras' installation of slot machines, Local 355 sought enforcement of the Agreement by demanding lists of employee names and addresses, demanding access to non-public areas of Mardi Gras' casino, and demanding that Mardi Gras cease making statements opposing Local 355's efforts to organize its workforce. (Pet. App. 67). After Mardi Gras balked at providing these things of value to Local 355 out of a concern over the Agreement's legality and rejected Local 355's demand to arbitrate the matter under the Agreement's arbitration provision, Local 355 sought to compel arbitration.[2] Shortly thereafter, Petitioner Mulhall initiated the present action against both Local 355 and Mardi Gras seeking an injunction precluding enforcement of the Agreement.

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[2] *See UNITE HERE Local 355 v. Hollywood Greyhound Track, Inc.*, Case No. 08-61655-CIV-Seitz/O'Sullivan (S.D. Fla. 2008) (Pet. App. 67, 71).

C. Course of Legal Proceedings and the Eleventh Circuit's Decision

Mulhall's complaint was initially dismissed by the district court for lack of standing. (Pet. App. 24-33). The Eleventh Circuit, in *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279 (2010) (*Mulhall I*), reversed. (Pet. App. 34-60).

On remand, the district court again dismissed the complaint, this time reasoning that Mulhall failed to state a viable claim under Section 302 of the Labor Management Relations Act, 29 U.S.C. § 186, since "none of the concessions directly benefitted any individual union official or union employee[.]" (Pet. App. 19). On appeal, the Eleventh Circuit again reversed. *Mulhall v. UNITE HERE Local 355*, 667 F.3d 1211 (2012) (*Mulhall II*). (Pet. App. 1-12).

In reaching its decision, the Eleventh Circuit held that union organizing assistance of the type promised by Mardi Gras and requested by Local 355 in this case could qualify as a "payment" of a "thing of value" within the meaning of Section 302. *Mulhall II*, 667 F.3d at 1215 (Pet. App. 6-8). Employing a "common sense" approach, the court noted that "value is usually set by the desire to have the 'thing' and depends upon the individual and the circumstances." *Mulhall II*, 667 F.3d at 1215 (Pet. App. 6) (quoting *United States v. Roth*, 333 F.2d 450, 453 (2d Cir. 1964)). As to whether such value constituted a "payment" within the meaning of Section 302, the court held:

> Whether something qualifies as a payment depends not on whether it is tangible or has monetary value, but on whether its performance fulfills an obligation. If employers offer organizing assistance with the intention of improperly influencing a union, then the policy concerns in § 302 – curbing bribery and extortion – are implicated. . . . [I]nnocuous ground rules can become illegal payments if used as valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer.

Id. (Pet. App. 8).

Noting that Local 355 spent $100,000 on the ballot initiative as consideration for the Agreement with Mardi Gras, the Eleventh Circuit concluded that Mulhall's complaint sufficiently alleged a violation of Section 302. *Id.* at 1216 (Pet. App. 8).

SUMMARY OF THE ARGUMENT

The Labor Management Relations Act was specifically enacted to ensure that employee free choice remained sacrosanct. The LMRA's provisions were principally designed as a limitation on union authority. In furtherance of these ends, the plain language of Section 302(a) of the Act makes it unlawful for an employer to pay or deliver, or agree to pay or deliver, "any money or other thing of value" to a union seeking to represent its employees, except in nine very specific and enumerated exceptions. Section 302(b)

sets forth the reciprocal obligation making it unlawful for a union to request, receive or accept any money or other thing of value.

Although the phrase "other thing of value" is undefined by the statute, the language of the context of the statute as a whole make it clear that "value" is to be defined as a function of the recipient's "desire to have the thing." Moreover, the use of the modifier "any," as well as the broadly worded phrase "other thing" demonstrates the intent of Congress that any other thing of value not be limited to tangible items with a commercially-recognized monetary value.

In contrast to the statutory prohibitions' breadth, the exceptions to Section 302 originally enacted by Congress were very specific. Moreover, since the LMRA's original enactment, it has been amended on a number of occasions to both broaden the prohibition and to enumerate additional exceptions as deemed necessary. Given this history, Local 355's arguments, which essentially advocate a judicially-created and unenumerated exception to Section 302 liability, is unpersuasive.

Viewed against this proper definition of "value," there can be no question that the Agreement between Local 355 and Mardi Gras conveys a thing of value to Local 355. Far from just a "ground rules" agreement as Local 355 insists, the Agreement in this case mandates that Mardi Gras assist Local 355 in organizing the employees; it interferes with the employees' rights to obtain complete and factual information on the

issue of representation, even if requested by the employees; it requires voluntary recognition by Mardi Gras on the basis of authorization cards alone and to forego an NLRB-supervised election; and it requires Mardi Gras to give up its prerogative to set employee wages and employment terms and conditions in favor of permitting an outside arbitrator to set them instead if initial negotiations with Local 355 do not quickly result in an agreement.

Such contractual commitments are of obvious value to Local 355. This conclusion is aptly illustrated by the fact that Local 355 solicited these commitments from Mardi Gras in the first place, that they formed the consideration for Local 355's reciprocal contractual commitments, and that Local 355 spent in excess of $100,000 in exchange for them.

Finally, Local 355's arguments that policy considerations underlying national labor law favor cooperative agreements between employers and labor unions is misplaced. First, such policy considerations are not a valid reason to ignore the plain language of the LMRA. Second, while there is no question that labor policy favors collective bargaining as well as the peaceful resolution of labor issues, it does not follow that precluding employers and unions to bypass employees altogether and agree to terms such as those at issue in this case would undermine such policy considerations. To the contrary, even the policy considerations favoring collective bargaining presupposes that the employees have first been given a voice and voluntarily chose representation. Here, the

employees were given no such voice and did not have an opportunity to choose, or refrain from choosing, to be represented before the Agreement was agreed upon by Local 355 and Mardi Gras. Moreover, the Agreement's provisions are actually inimical to employee free choice, so far as, *inter alia*, it prevents an employer from responding to employee inquiries on unionization, it bars a secret ballot election supervised by the NLRB, and it precludes pursuit to the NLRB of any unfair labor practices conducted during union organizing. Contrary to the argument that the Eleventh Circuit's interpretation of Section 302 undermines the language and intent of the LMRA, such a construction actually supports the statute's goal of elevating employee free choice above employer and union interests.

ARGUMENT

I. A Contractual Agreement in Which a Union Requests and Receives Employer Commitments Not to Oppose Unionization, Access to Employees and Facilities, Voluntary Recognition on the Basis of Authorization Cards and Interest Arbitration Concerning Employment Terms is a "Thing of Value"

The language, structure and intent of Section 302 make it clear that contractual commitments not to oppose unionization efforts, to provide otherwise unavailable access to employees and facilities, to forego an NLRB-supervised secret ballot election in favor of

voluntary recognition of a union based solely on authorization cards, and to agree to permit an arbitrator to set the wages, hours and terms of employment for employees are things of value within the meaning of Section 302.

As detailed herein, contrary to Local 355's arguments, these contractual commitments cannot be dismissed as simple organizing "ground rules." To the contrary, these commitments implicate the precise concerns regarding potential conflicts of interest between unions and the employees it seeks to represent that underlie the enactment of the LMRA. Such agreements specifically circumvent the LMRA's express goal of fostering employee free choice by virtue of the fact that the employees have no voice in the arrangement and, further, by contractually ensuring that the employees are precluded from seeking complete information from their employer to enable them to make an informed choice.

A. Applicable Legal Standard

At the outset, it should be noted that this case is before the Court at the motion to dismiss stage. At this stage, Mulhall's complaint need only contain sufficient factual allegations, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable

for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). In reaching this determination, courts employ a "context-specific task" and should "draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 678.

As the inquiry in this case turns on the proper interpretation of statutory terms and phrases, including "thing of value" and "payment, loan, or delivery," it necessarily involves a question of law to be defined by the Court. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 369 (1995) ("Because statutory terms are at issue, their interpretation is a question of law and it is the court's duty to define the appropriate standard"). However, to the extent that the issues in a given case are dependent upon the factual context, the inquiry may be more properly characterized as a mixed question of law and fact. *See, e.g.*, *Chandris, Inc.*, 515 U.S. at 369; *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 355-56 (1991) (Construing definition of "seaman" in Jones Act case).

B. Section 302 of the Labor-Management Relations Act of 1947

In passing the Labor-Management Relations Act (LMRA) (also commonly referred to as the Taft-Hartley Act), Congress sought to "equalize legal

responsibilities"[3] of both labor organizations and employers by amending the National Labor Relations Act of 1935 (NLRA),[4] which had been criticized as "one-sided legislation, slanted heavily in favor of organized labor." THE DEVELOPING LABOR LAW 32 (John E. Higgins, Jr. ed., BNA Books, 5th ed. 2006); *see also Arroyo v. U.S.*, 359 U.S. 419, 425 (1959) ("[Section 302] was enacted as part of a comprehensive revision of federal labor policy in light of experience acquired during the years following passage of the [NLRA], and was aimed at practices which Congress considered inimical to the integrity of the collective bargaining process").

The LMRA emphasizes that the legitimate rights of employees are paramount and declares a policy "to protect the rights of individual employees in their relations with labor organizations[.]" 61 Stat. 136, § 1(b). Reinforcing the sanctity of employee free choice, the LMRA amended the NLRA's provision which guaranteed that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection" to also

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[3] 61 Stat. 136 ("AN ACT to amend the National Labor Relations Act, to provide additional facilities for the mediation of labor disputes affecting commerce, to equalize legal responsibilities of labor organizations and employers, and for other purposes").

[4] 29 U.S.C. §§ 151-163; 49 Stat. 449 (1935).

include the specific "right to refrain from any or all of such activities[.]" 61 Stat. 136, 140, § 101; 29 U.S.C. § 157.

While the NLRA originally contained no provisions regulating the conduct of labor organizations, the LMRA regulates union conduct by, *inter alia*, adding broad proscriptions on payments to unions and their agents from employers. 29 U.S.C. § 186; 61 Stat. 136, § 302. Specifically, Section 302(a)(2) makes it unlawful for an employer "to pay, lend, or deliver, or agree to pay, lend or deliver, any money or other thing of value . . . to any labor organization . . . which represents or seeks to represent . . . any of the employees of such employer[.]" 29 U.S.C. § 186(a)(2). Likewise, Section 302(b)(1), makes it unlawful for a union "to request, demand, receive, or accept, or agree to receive or accept, any payment, loan or delivery of any money or other thing of value prohibited by [Section 302(a)(2)]."

In contrast to these general prohibitions, section 302(c) establishes nine very specific exceptions. 29 U.S.C. § 186(c). These statutory exceptions include, for example, payments to a union in satisfaction of a judgment; remitting employee union dues to the union; and, employer contributions to health, pension, education assistance, and child care trust funds established by the union for the benefit of the employees. 29 U.S.C. § 186(c)(2), (4), (5) and (7).

In this case, the parties agree that none of the enumerated exceptions are applicable to the Agreement between Local 355 and Mardi Gras. Notwithstanding, as detailed below, Congress' decision to meticulously legislate numerous statutory exceptions to the general proscriptions set forth in subsections 302(a) and (b) clearly demonstrates an intent to limit the exceptions to only those enumerated in the statute.

C. The Proper Construction of "Other Thing of Value"

An employer's contractual obligation to assist a specific union in organizing its employees, to recognize that union based solely on authorization cards, and to permit an arbitrator to set employment terms for its employees is most certainly a "thing of value" within the meaning of Section 302 to a union seeking to represent the employees.

"As is true in every case involving the construction of a statute, [the] starting point must be the language employed by Congress." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979). Although the LMRA does not define "thing" or "value," the plain language of Section 302 makes it clear that Congress' intended a broad construction. To this end, the statute prohibits payment of "any money or other thing of value." More broad language is difficult to fathom than the specific inclusion of any "other thing of value." Indeed, in *Arroyo*, this Court characterized Section 302

as a "broad prohibition" with, at the time, only five specifically-enumerated exceptions. *Arroyo*, 359 U.S. at 420. Likewise, in its most recent case involving Section 302, the Court again reiterated that "[t]he prohibitions of subsection (a) and (b)(1) are drawn broadly[.]" *Local 144 Nursing Home Pension Fund v. Demisay*, 508 U.S. 581, 585 (1993).

In addition to the breadth of the statutory language, the Court's prior decisions also make clear that a "literal construction" of Section 302 is required. *Arroyo*, 359 U.S. at 424. In both *Arroyo* and *Demisay*, the Court has rejected arguments to supplement Section 302's language to provide more than what the statutory language actually states. For example, in *Arroyo*, the Court rejected the argument that Section 302 should be extended to prohibit the theft by a union official of trust funds lawfully paid by the employer, recognizing that the statutory language did not cover such conduct. 359 U.S. at 423-24. Likewise, in *Demisay*, the Court rejected the argument that Section 302(e) of the LMRA, which provides for injunctions to restrain violations of Section 302(a) and (b), should be construed to also provide for injunctions to require that trust fund trustees comply with the terms of the trust. 508 U.S. at 587-88. In so holding, the Court rejected the invitation to interpret Section 302 "as authorizing the development of a specialized body of federal common law of trust administration." 508 U.S. at 589.

Local 355's argument that Section 302's juxtaposition of the phrase "other thing of value" alongside

the word "money" demonstrates an intent that "other thing of value" is limited to "things that are monetary equivalents" is unpersuasive. This argument essentially invokes the principle of *ejusdem generis*, which provides that "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *United States v. Douglas*, 634 F.3d 852, 858 (6th Cir.), *cert. denied*, 131 S.Ct. 3039 (2011) (quoting *Wash. State Dept. of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384-85 (2003)). However, as the Sixth Circuit aptly noted in rejecting this very argument as applied to Section 302, "that rule applies to 'list[s] of specific items separated by commas and followed by a general or collective term,' not to a 'phrase [that] is disjunctive, with one specific and one general category.'" *Douglas*, 634 F.3d at 858 (citing *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 225 (2008)).

Aside from the literal language of Section 302(a) and (b), the structure of the statute further supports the conclusion that "things of value" was meant to be construed broadly to ensure the protection of employees from collusion by unions and employers. The fact that Section 302(a) and (b) are phrased in the broadest possible terms, while also specifying nine very specific exceptions, illustrates the breadth intended by Section 302(a) and (b). *Arroyo*, 359 U.S. at 420. As detailed below, that Congress included specific enumerated exceptions, and has amended the LMRA on

several occasions to add more as necessary, counsels against creating additional judicially-created exceptions under the guise of interpreting otherwise unambiguous statutory terms.

The implication of much of Local 355's arguments in this case is that the national labor policy favors cooperative agreements between employers and unions and, consequently, there should be an unfettered ability of employers and unions to do so without implicating Section 302. While no doubt true in many contexts, this argument is unpersuasive in this context. What Local 355's argument fails to recognize is that agreements, such as the one at issue in this case, disregard the interests and voices of the employees involved. In fact, such agreements erect barriers to employee free choice. Contrary to the implicit assumptions in Local 355's arguments, the LMRA was not enacted to make it easier for unions to organize non-union employees. It was enacted to ensure that employees were free to make that choice for themselves. Agreements whereby unions who do not represent the employees but are nonetheless given (1) control over an employer's speech; (2) access to otherwise-unavailable facilities; (3) personal employee information; (4) the ability to become the exclusive representative without the possibility of an election; and (5) a commitment to permit an outside arbitrator to set employment terms if the union is recognized and the parties are unable to quickly negotiate a collective bargaining agreement, are contrary to the LMRA's goal of ensuring that employee

free choice predominates over all other considerations.

Consistent with the "common sense" approach endorsed in *Arroyo*, 359 U.S. at 424, the Eleventh Circuit aptly recognized that whether something has "value" is a function of "the desire to have the 'thing.'" *Mulhall II*, 667 F.3d at 1215; *see also Roth*, 333 F.2d at 453.

Requiring that a "thing of value" have a recognized monetary value or commercial marketplace value substantially eviscerates the purpose of Section 302. Here again, such an interpretation would enable union representatives to trade employee loyalty for items that they subjectively value simply because a marketplace for the item does not exist or a monetary value cannot be readily established. Courts have properly rejected such a narrow interpretation. *See United Douglas*, 634 F.3d at 858-59 (Rejecting the proposition that a "thing of value" must have "monetary value" and holding that union representatives who pressured an employer to give highly sought after jobs to non-qualified relatives of union members violated Section 302); *Roth*, 333 F.2d at 453.[5]

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[5] Limiting a "thing of value" to only tangible items of value is also inconsistent with the body of case law construing the identical phrase in other statutes with similar aims, such as 18 U.S.C. § 1954 (proscribing the offer, solicitation or acceptance of a thing of value to influence operations of an employee benefit plan). *See, e.g.*, *United States v. Schwartz*, 785 F.2d 673, 680-81 (9th Cir.), *cert. denied*, 479 U.S. 890 (1986); *see also United*

(Continued on following page)

Insomuch as it is clear that Section 302 was designed to ensure employees are free to choose whether they wish to be represented by a labor organization or refrain from doing so without employer or union interference, the only construction of "thing of value" within the meaning of Section 302 that comprehensively accomplishes this aim is one in which value is defined as a function of what motivates those involved in the exchange. The Eleventh Circuit's recognition that "value" in this sense must necessarily be tied to the union's "desire to have the 'thing'" properly accounts for the statutory purpose.

D. The Contractual Commitments Exchanged in This Case Are Indisputably Valuable to Unions

The fact that the contractual commitments in this case have value is perhaps best borne out by the fact that Local 355 specifically sought them from Mardi Gras. Indeed, the valuable nature of these commitments is self-evident from the fact that they serve as the consideration for the union's contractual obligations. Without value, such contracts would be unenforceable, a result that not even Local 355 or any of its supporting *amici* are asserting.

States v. Girard, 601 F.2d 69, 71 (2d Cir.), *cert. denied*, 444 U.S. 871 (1979) (In a criminal case under 18 U.S.C. § 641, the court noted "[t]he word 'thing' notwithstanding, the phrase is generally construed to cover intangibles as well as tangibles").

As noted above, value is not dependent upon these types of contractual commitments by an employer being tangible or that there exist a recognized commercial marketplace for them. Such artificial limitations are not supported by the plain language of the statute, nor the statute's purpose of preventing undue or improper influence in the relationship between employer and union to the detriment of employee free choice.

While there is no doubt that the payment of money or commercial items can serve to corrupt the labor representation process, this same potential for conflicts of interest is presented by the delivery of intangible things of value, such as promises of desirable job assignments or preferential schedules to employee union stewards. Such intangible benefits have the potential to undermine the loyalty of union officials in much the same manner as money or other tangible things of value. Construing Section 302 narrowly to exclude intangible things would enable employers and unions to avoid its purpose of empowering employees through the creative exchange of items that, though not tangible, nonetheless present clear value to the individuals involved.

Moreover, while there does not appear to be a recognized marketplace for the buying and selling of union organizational assistance, voluntary recognition and the imposition of an interest arbitration provision, is there really any question that such commitments would readily command a market price should a large employer of non-union employees

advertise such a "thing" for sale? Given the resources, financial and otherwise, that labor organizations devote to organizing campaigns, and in light of the fact that Local 355 in this case committed to spend more than $100,000 of its funds to gain such commitments, there is no question that these commitments command a market value.

This Court's decision in *Linden Lumber Division, Summer & Co. v. NLRB*, 419 U.S. 301 (1974), supports the proposition that the commitments made by Mardi Gras in this case are valuable to Local 355. In *Linden Lumber*, the Court held that an employer which has not committed any unfair labor practices during a union organizing campaign is not required to voluntarily recognize a union which has obtained signed union authorization cards from a majority of the employees in the bargaining unit it seeks to represent. *Id.* at 310. Rather, the employer may insist that the union seek a secret ballot election supervised by the NLRB. *Id.* In so holding, the Court noted that although union authorization cards "may 'adequately reflect employee sentiment[,]'" the NLRB's "election process had acknowledged superiority in ascertaining whether a union has majority support." *Id.* at 304 (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 603 (1969)). Given the employer's right to seek a secret ballot election even where a union has obtained a majority of union authorization cards, it is apparent that a contractual commitment given by an employer, and sought by a union, precluding an election possesses substantial value to the union.

Similarly, courts have repeatedly held that the types of things at issue in this case have significant value. *United States v. Barger*, 932 F.2d 359, 368 (6th Cir. 1991) (Provision of information); *NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849, 856, n.4 (5th Cir. 1986) (use of property); *United States v. Zimmermann*, 509 F.3d 920, 926-27 (8th Cir. 2007) (Use of property); *United States v. Nilsen*, 967 F.2d 539, 542-43 (11th Cir. 1992) (control over communications).

E. The Prohibition of Agreements Such as the One at Issue in This Case Does Not Undermine the Policy of Fostering Peaceful Relations Between Employers and Unions

Local 355 and its supporting *amici* contend that the construction of Section 302 to prohibit an agreement of the kind executed by it with Mardi Gras in this case is counter to the NLRA's intent to foster peaceful cooperation between employers and unions. This argument presents a false dichotomy. While there is no doubt that one goal of the country's labor laws is to foster peaceful labor relations, the prohibition of these types of union-employer agreements does not inevitably lead to labor unrest, nor would it undermine employee free choice. To the contrary, a prohibition of these types of agreements fosters employee choice.

Conspicuously absent from the arguments by Local 355 and its supporting *amici* is any reference to

the interests of the employees themselves. As this case amply demonstrates, employees have absolutely no voice in the negotiation and formation of agreements of the type at issue here, notwithstanding that the rights of the employees are clearly implicated. Moreover, such agreements are not analogous to collective bargaining agreements as Local 355 argues. In negotiating and implementing a collective bargaining agreement, the employees affected have already agreed to be represented by the union and the employees have a dispositive voice in the negotiation and ratification of the terms agreed upon between their employer and their union. That is not the case with an agreement of the kind at issue in this case.

Moreover, in addition to the employees having no voice in the relationship between the employer and union contrary to the expressed purpose of the LMRA in fostering employee choice, these agreements actually go further and expressly interfere with the employees' ability to seek information from their employer to the extent that the information sought might be adverse to the union's organizational interests. Hence, if an employee sought to discuss the pros and cons of unionization with his or her employer, the agreement would prevent it. Preventing unions from purchasing employer silence in this manner, to the detriment of the employees' right to make an informed choice whether to unionize or refrain from doing so, is precisely the purpose espoused in the LMRA and Section 302 in particular.

Likewise, while the labor laws favor the peaceful negotiation of collective bargaining agreements between employers and unions, it does so only to the extent that the employees involved actually choose to be represented by the union. As noted above, the LMRA specifically amended the NLRA to make it explicit that employees have the right to refrain from union representation. Accordingly, Local 355's implied premise throughout its brief that its interests are one and the same with the employees' interests is unsupported and contrary to the assumption underlying the enactment of the LMRA. To the contrary, the Agreement in this case infringes on the employees' rights to make an informed choice on unionization and to the benefit of an NLRB-supervised election requested by the employer.

F. The Decisions of the Third and Fourth Circuits Are Erroneous

As it did before the Eleventh Circuit, Local 355 contends that the decision of the Third Circuit in *Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC*, 390 F.3d 206 (2004), and the decision of the Fourth Circuit in *Adcock v. Freightliner LLC*, 550 F.3d 369 (2008), represent the proper interpretation of Section 302. To the contrary, these decisions misapprehend the proper issue and reach an erroneous conclusion.

The Third Circuit in *Sage Hospitality* concluded that the employer's promise of neutrality lacked

value, holding that "[t]he fact that a Neutrality Agreement – like any other labor arbitration agreement – benefits both parties with efficiency and costs saving does not transform it into a payment or delivery of some benefit." 390 F.3d at 219. Likewise, the Fourth Circuit in *Adcock* concluded that employer concessions such as access to employees "do not involve the delivery of either tangible or intangible items to the Union." 550 F.3d at 374. To illustrate its conclusion, the Fourth Circuit analogized that "[a] vacuum salesman who is permitted by a company to make a sales pitch to employees does not receive a thing of value from the company." *Id.*

Contrary to these conclusions, as discussed above, there can be no question that contractual commitments of the type afforded to Local 355 in this instance are valuable. Indeed, the value is aptly illustrated in Local 355's case by the fact that it agreed to deliver its own contractual commitments in exchange for them and, as further *quid pro quo*, agreed to spend in excess of $100,000 to secure the commitments. No doubt a vacuum salesperson otherwise lacking access to the customer base would disagree with the Fourth Circuit's contention that the provision of such access possesses no value.

II. Local 355 Is Seeking a Judicially-Created Exception to Supplement Section 302(c)'s Statutorily-Enumerated Exceptions

As the employer's commitments in this case clearly (1) constitutes a "thing"; (2) has value; and, (3) was paid or delivered to the union within the plain meaning of Section 302. What Local 355 is seeking, at its essence, is the judicial creation of an implied exception to supplement the nine statutorily-enumerated exceptions created by Congress. Local 355's argument is inconsistent with the language of the statute itself as well as Congress' treatment of it since its passage.

As originally enacted, Section 302(c) contained five explicit exceptions to the proscriptions set forth in Section 302(a) and (b). 61 Stat. 136, 157-58 (currently codified at 29 U.S.C. § 186(c)(1)-(5). As is readily seen by the statutory language itself, these five exceptions are specifically tailored to the types of exchanges between an employer and a union that Congress at the time sought to foster.

Since the LMRA's passage in 1947, as Congress sought fit to foster additional valuable exchanges between employers and labor organizations, it has acted to amend and add to Section 302(c). Indeed, Section 302(c)'s enumerated exceptions have been amended on five occasions – in 1959, 1969, 1973, 1978 and again in 1990.

In 1959, as part of the Labor-Management Reporting and Disclosure Act of 1959, Congress added

an exception for payments by an employer to trust funds established by a union for purposes of pooled vacation, holiday, severance or other similar benefits, or defraying costs of apprenticeship and training programs. 73 Stat. 519, 539, § 505 (codified at 29 U.S.C. § 186(c)(6)). Thereafter, in 1969, Congress added an exception to permit payments to trust funds for purposes of educational scholarships or dependent child care. 83 Stat. 133 (codified at 29 U.S.C. § 186(c)(7)). In 1973, Congress added 29 U.S.C. § 186(c)(8), to permit employer contributions to trust funds established for purposes of defraying costs of certain legal services. 87 Stat. 314. In 1978, Congress added 29 U.S.C. § 186(c)(9) as part of the Labor Management Cooperation Act of 1978. 92 Stat. 2021, § 6(d). Finally, in 1990, Congress added 29 U.S.C. § 186(c)(7) to permit employer contributions to trust funds for purposes of providing financial assistance for employee housing. 104 Stat. 138.

The specific inclusion of numerous exceptions to Section 302(a) and (b), together with the repeated amendments by Congress when it has deemed it necessary to establish additional exceptions, precludes the judicial creation of any additional exceptions for "ground rules" organizing agreements or otherwise. This conclusion is supported by the well-established principle of *inclusion unius, exclusion alterius*. *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 86 (1994); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993).

Additionally, not only did the Labor-Management Reporting and Disclosure Act of 1959 add an

additional statutory exception to Section 302(c)'s enumerated list of exceptions, but that Act also amended Section 302(a) by adding subsections (a)(2) and (a)(3). 73 Stat. 519, 537, § 505. Those subsections expanded the already broad language of Section 302 to prohibit not only exchanges of value involving any representative of the employer's employees, but also to prohibit such exchanges involving a labor organization which "seeks to represent" the employer's employees. 29 U.S.C. § 186(a)(2). Thus, not only has Congress acted when it deems appropriate to expand the exceptions set forth in Section 302(c), but it has also acted to ensure that the conduct of unions seeking to organize employees, as was the case here with Local 355, is subject to the prohibitions of Section 302.

As this Court has counseled, "courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so, and no matter how widely the blame may be spread." *Brogan v. United States*, 522 U.S. 398, 408 (1988). Even where, as here, the statute involved is a criminal statute, this Court has nonetheless rejected "the proposition that criminal statutes do not have to be read as broadly as they are written[.]" *Id.* at 406; *see also Salinas v. United States*, 522 U.S. 52, 58 (1997) (Rejecting judicially-created "federal funds" limitation to a prohibition on government officials accepting "anything of value" because "[t]he statute's plain language fails to provide any basis for [such a limitation]"). Notwithstanding, this is precisely what Local

355 seeks in this instance. Its invitation to do so should likewise be rejected.

CONCLUSION

The LMRA was enacted by Congress for the explicit purpose of limiting union activities deemed undesirable and reaffirming the importance of employee free choice above all other considerations. Agreements between unions and employers such as the one at issue here, in which the employees themselves lack any input or voice, expressly limit the ability of employees to make informed decisions regarding union representation or to otherwise ensure that their rights are preserved. Contrary to supporting the purpose of the LMRA, such agreements are inconsistent with such goals.

For the foregoing reasons, the Eleventh Circuit's decision should be affirmed.

Respectfully submitted,

ROBERT L. NORTON,
Counsel of Record
ALLEN, NORTON &
BLUE, P.A.
121 Majorca Avenue,
Suite 300
Coral Gables, Florida
33134-4508
(305) 445-7801
rnorton@anblaw.com

BRIAN KOJI
ALLEN, NORTON &
BLUE, P.A.
324 S. Hyde Park Avenue,
Suite 225
Tampa, Florida 33606-4128
(813) 251-1210
bkoji@anblaw.com

RESPONDENT'S BRIEF

RECORD AND BRIEFS

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Supreme Court of the United States

UNITE HERE LOCAL 355,

Petitioner,

v.

MARTIN MULHALL, HOLLYWOOD GREYHOUND TRACK, INC., d/b/a MARDI GRAS GAMING,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENT MARTIN MULHALL

WILLIAM L. MESSENGER
Counsel of Record
c/o NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road
Suite 600
Springfield, VA 22160
(703) 321-8510
wlm@nrtw.org

Counsel for Martin Mulhall

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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QUESTION PRESENTED

Section 302(a)(2) of the Labor Management Relations Act makes it unlawful for an employer to "pay, lend, or deliver any money or other thing of value . . . to any labor organization," with exceptions inapplicable here. 29 U.S.C. § 186(a)(2). Do the following three things, when demanded by a labor organization to help it unionize employees, constitute a "thing of value" to the labor organization under Section 302:

1. lists of personal information about nonunion employees;

2. use of the employer's private property for organizing; and,

3. control over the employer's communications regarding unionization?

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IN THE

Supreme Court of the United States

No. 12-99

UNITE HERE LOCAL 355,

Petitioner,

v.

MARTIN MULHALL, HOLLYWOOD GREYHOUND TRACK, INC., d/b/a MARDI GRAS GAMING,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENT MARTIN MULHALL

STATEMENT

A. Section 302

Federal law grants unions an extraordinary power: if a union meets certain qualifications, it can become the "exclusive representative" of a group of employees for collective bargaining with their employer. 29 U.S.C. § 159(a). That power creates a fiduciary relationship between the union and employees, similar to that between trustee and beneficiary, or attorney and client. *Air Line Pilots v. O'Neill*, 499 U.S. 65, 74-75 (1991). And, as Congress long ago recognized, that fiduciary relationship carries the potential for abuse because of the power with which the union is entrusted. *See* S. Rep. No. 86-187 (1959),

reprinted in 1959 U.S.C.C.A.N. 2318, 2330. "For centuries," one Senate report observed, "the law has forbidden any person in a position of trust to hold interests or enter into transactions in which self-interest may conflict with complete loyalty to those whom they serve." *Id.* Or, as Senator Carl Hatch explained by analogy: "[A] lawyer knows full well that he, representing a client, would not take a gift from the opposition." 92 Cong. Rec. 5428.

Determined to forbid such conflicts of interest in labor relations, Congress enacted Section 302 of the Labor Management Relations Act ("LMRA"). Section 302(a)(2) makes it "unlawful *for any employer . . . to pay, lend, or deliver, any money or other thing of value . . . to any labor organization*, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer." 29 U.S.C. § 186(a)(2) (emphasis added). Section 302(b) reciprocally makes it "unlawful for any person to request, demand, receive, or accept . . . any money or other thing of value prohibited by subsection (a)." *Id.* § 186(b)(1). Section 302(c) states nine exceptions to these prohibitions. *Id.* § 186(c). The provision carries criminal penalties and is enforceable through civil actions. *Id.* §§ 186(d)-(e).

Section 302 is designed to prevent "conflict[s] of interest" and protect employees "from the collusion of union officials and management." Pet. App. 52. As the Solicitor General observes, Congress wanted to "'prevent employers from tampering with the loyalty of union officials.'" S.G. Br. 22-23 (quoting *Turner v. Local Union No. 302, Int'l Bhd. of Teamsters*, 604 F.2d 1219, 1227 (9th Cir. 1979)). It also wanted to "prohibit[ ] . . . the buying and selling of labor

peace[.]" S. Rep. No. 98-225 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3477.

As originally enacted, Section 302 applied only to unions that were already the "representative" of the "employees" at issue. *See Arroyo* v. *United States*, 359 U.S. 419, 423 (1959). In 1959, however, Congress amended the provision in the Labor Management Reporting and Disclosure Act of 1959 ("LMRDA"), 73 Stat. 519, to apply to union organizing activities. The amendment extended the prohibition against receiving "thing[s] of value" to any union that "*seeks to represent* . . . any of the employees of such employer." 29 U.S.C. § 186(a)(2) (emphasis added).

B. Modern Union Organizing Practices

Notwithstanding Section 302's prohibitions, in recent years unions have taken to demanding from employers "thing[s] of value"—namely, assistance with unionizing employees—to circumvent the traditional organizing process provided for under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*[1]

1. In the traditional, or "bottom up," organizing process, the union tries to gain employees' support before attempting to deal with their employer.[2] If thirty percent of employees choose to support the

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[1] *See, e.g.*, James J. Brudney, *Collateral Conflict: Employer Claims of RICO Extortion Against Union Comprehensive Campaigns*, 83 S. Cal. L. Rev. 731, 740-42 (2010); Mark A. Carter & Shawn P. Burton, *The Criminal Element of Neutrality Agreements*, 25 Hofstra Lab. & Emp. L.J. 173, 175-76 (2007); Charles I. Cohen, et al., *Resisting Its Own Obsolescence-How the National Labor Relations Board Is Questioning the Existing Law of Neutrality Agreements*, 20 Notre Dame J.L. Ethics & Pub. Pol'y 521, 522 (2006).

[2] *See* Zev J. Eigen & David Sherwyn, *A Moral/Contractual Approach to Labor Law Reform*, 63 Hastings L.J. 695, 713-15 (2012); Brudney, 83 S. Cal. L. Rev. at 742-43.

union, it can petition the National Labor Relations Board for a secret-ballot election under 29 U.S.C. § 159(c), which is "the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969). Alternatively, if more than fifty percent of employees support the union, it can request the employer's voluntary recognition under 29 U.S.C. § 159(a), although an employer can refuse or demand a secret-ballot election. *Id.* § 159(c)(1)(B). Only after establishing that it has majority employee support does the union become their monopoly bargaining representative. *Id.* § 159(a).

To effectuate employee free choice, Congress enacted rules aimed at preventing misconduct and spurring the free flow of information during organizing. For one, it enacted free-speech protections, *see* 29 U.S.C. § 158(c), to encourage "'uninhibited, robust, and wide-open debate in labor disputes.'" *Chamber of Commerce v. Brown*, 554 U.S. 60, 68 (2008) (citation omitted). It also enacted unfair-labor-practice procedures to protect employees from union and employer misconduct. 29 U.S.C. §§ 158(a) & (b).

Notably, however, Congress did not grant unions a right to employer assistance with organizing their employees. For example, unions have no statutory right to use an employer's private property for organizing. *See Lechmere v. NLRB*, 502 U.S. 527, 532-34 (1992). Nor do they have a statutory right to information about the employer's nonunion employees before filing a valid NLRB election petition. *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 (1969). Indeed, "[b]y its plain terms . . . the NLRA confers rights only on *employees*, not on unions or

their nonemployee organizers." *Lechmere*, 502 U.S. at 532 (emphasis in original).

2. "Over the past twenty-five years," however, "unions have turned increasingly to strategies outside the traditional framework of the [NLRA]."[3] The primary new tactic is "top-down" organizing, in which a union, instead of first seeking employee support, coerces or induces the employer to enter into an organizing agreement. As Unite puts it, "neutrality agreements privatize the organizing process" in order to avoid what it calls "the NLRB's lengthy and expensive processes." Unite Br. 25.

Although the terms of organizing agreements vary, common features prohibit employers from speaking about unionization, ban NLRB-run secret ballot elections, prohibit the filing of unfair-labor-practice charges with the NLRB, and require that employers give union organizers confidential information about their workforce and free use of their property for organizing.[4] Unsurprisingly, this employer assistance dramatically increases a union's odds of organizing the targeted employees.[5] For example, "unions in one study prevailed in 78% of the situations in which they attempted to organize, compared to only a 46% success rate in contested elections."[6]

To obtain these benefits, some unions agree in advance to make wage, benefit, or other concessions at

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[3] Brudney, 83 S. Cal. L. Rev. at 732; *see also* authorities at fn. 1, *supra*.

[4] Eigen & Sherwyn, 63 Hastings L.J. at 721-22; Carter & Burton, 25 Hofstra Lab. & Emp. L.J. at 177; Cohen, 20 Notre Dame J.L. Ethics & Pub. Pol'y at 522-23.

[5] Eigen & Sherwyn, 63 Hastings L.J. at 722.

[6] *Id.*

the expense of the employees they seek to represent. *Adcock v. Freightliner*, 550 F.3d 369 (4th Cir. 2008), is illustrative. In that case, in exchange for organizing assistance from an employer, the union secretly agreed that any future collective bargaining agreement would contain, among other things, "no provisions for severance pay . . . in the event of a layoff or plant closure"; "no wage adjustments provided at any newly organized facility prior to mid–2003"; and "no guaranteed employment or transfer rights between Business Units or Plants." *Id.* at 372.

In addition, unions often pressure employers for assistance with unionizing their employees. Unions utilize a variety of economic and political tactics, including systematic "corporate campaigns," to threaten and harm employers to such a degree that they enter into organizing agreements to make the union relent.[7]

Although examples of earlier organizing agreements exist, it was not until the 1990s that unions made top-down organizing their primary tactic for acquiring more members and forced-dues payers.[8] The question presented here is whether three components of this new tactic—namely, union demands for employee information, free use of employer property, and control over employer speech—violate Section 302(a)(2)'s prohibition of a union demanding any "thing of value" from an employer whose employees it seeks to represent.

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[7] Brudney, 83 S. Cal. L. Rev. at 737-44; *see infra* at 34.

[8] Carter & Burton, 25 Hofstra Lab. & Emp. L.J. at 175-76; Brudney, 83 S. Cal. L. Rev. at 740-42; Cohen, Notre Dame J.L. Ethics & Pub. Pol'y at 522.

C. Proceedings Below

This case is before the Court on a motion to dismiss. Accordingly, the facts stated in the Complaint must be accepted as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

1. Mardi Gras Gaming operates a racetrack-casino in Hollywood, Florida. Pet. App. 65. In 2004, it entered into an organizing agreement with Unite Here Local 355 in which Mardi Gras agreed to help Unite unionize its employees in exchange for promises of "labor peace" and Unite's support for a ballot initiative promoting casino gaming. *Id.* at 66.

Specifically, Mardi Gras agreed to provide Unite with three types of organizing assistance: (1) lists of confidential information about Mardi Gras' nonunion employees, including their "job classifications, departments, and addresses"; (2) use of Mardi Gras' private property for organizing; and (3) control over Mardi Gras' communications to nonunion employees regarding unionization. *Id.* at 79-81. The last provision stated that "[t]he Employer will not do any action nor make any statement that will directly or indirectly state or imply any opposition by the Employer" to unionization or any particular union. *Id.* at 79.

In addition, Mardi Gras agreed to recognize Unite as its employees' exclusive representative if the union produced authorization cards from a majority of employees. *Id.* at 81-82. The company agreed not to petition the NLRB for a secret-ballot election regarding union representation or to file charges with the NLRB "in connection with any act or omission occurring within the context of this agreement." *Id.* After unionization, the Agreement provides for

binding arbitration that guarantees Unite a collective bargaining agreement. *Id.* at 82.

In exchange, Unite promised Mardi Gras that it would not strike, picket, or take other economic actions against Mardi Gras during the organizing process. *Id.* at 79, 82. Unite also promised that it would campaign in support of a ballot initiative expanding casino gaming. *Id.* at 66. Unite estimates that Mardi Gras would have lost over $100,000 in business from a Unite boycott, and that the time and money the union and its members spent on the ballot initiative exceeded $100,000. J.A. 24.

2. In 2006, the ballot initiative passed and Mardi Gras installed slot machines, triggering the organizing agreement. Pet. App. 14, 38. Mardi Gras initially complied with the agreement, but refused to provide an updated employee list to Unite in 2008. *Id.* The union sought to enforce the agreement through arbitration and largely prevailed. *Id.* at 39.

In 2009, Mardi Gras distributed a flier critical of the union that Unite believed violated the agreement, and Unite again initiated arbitration. *See* S.G. Br. 3-4. The arbitrator enforced the agreement's gag-clause and extended the agreement's terms by one year. *Id.*

The neutrality agreement expired on or before December 31, 2011. However, Unite continues to demand that Mardi Gras provide it with the assistance specified in the agreement, and filed suit in 2012 to compel arbitration for alleged violations of the agreement that occurred in 2011. *Id.* at 4. That proceeding has been stayed pending the outcome of this case. *Id.*

3. Martin Mulhall is a groundskeeper employed by Mardi Gras. Pet. App. 65. He filed suit, alleging that Unite is violating Section 302(b)(1) by requesting and demanding three "thing[s] of value" from his employer: lists of employee information, free use of Mardi Gras' property for organizing, and control over Mardi Gras' actions and communications regarding unionization. *Id.* at 74.

Mulhall's Complaint explains in detail why these things have significant value to Unite, including monetary value. *Id.* at 68-71. For example, the Complaint alleges that delivery of the three requested benefits "will result in a significant monetary benefit to the union because, among other things, it will reduce the expense of conducting an organizing campaign against Mardi Gras employees and likely result in an increase in dues revenues for the union." *Id.* Unite confirmed the tangible value of Mardi Gras' promises in parallel legal proceedings, pleading that Mardi Gras' refusal to comply with the organizing agreement has resulted in "increased organizing expenses and lost revenues for the Union," *id.* at 71, and that Unite conducted a $100,000 political campaign in exchange for the agreement. J.A. 24.

The district court dismissed Mulhall's Complaint for lack of standing. Pet. App. 29-33. The Eleventh Circuit reversed in *Mulhall v. Unite Here*, 618 F.3d 1279 (11th Cir. 2010) ("*Mulhall I*"). The court held that "Mulhall has adequately alleged that the organizing assistance promised by Mardi Gras in the [agreement] is valuable, and indeed essential, to Unite's effort to gain recognition," and that Unite's willingness to spend "$100,000 on the initiative campaign . . . suggest[s] that the organizing assistance it bargained for was significant in a monetary

sense." Pet. App. 44, 48. The court separately explained that Mulhall had prudential standing because Section 302 "'prohibit[s], among other things, the buying and selling of labor peace,' something that the [organizing agreement] at least arguably does." *Id.* at 52 (citation omitted).

On remand, the district court dismissed the complaint on the merits. *Id.* at 13-23. The Eleventh Circuit again reversed, holding "that organizing assistance can be a thing of value that, if demanded or given as payment, could constitute a violation of § 302." *Id.* at 2. The court reasoned that it "seems apparent that organizing assistance can be a thing of value." *Id.* at 7. It believed that "intangible organizing assistance cannot be loaned or delivered because the actions 'lend' and 'deliver' contemplate the transfer of tangible items." *Id.* It held, however, that an intangible can act as a "payment" if "its performance fulfills an obligation." *Id.* at 7-8. Here, the "$100,000 Unite spent on the ballot initiative that was consideration for the organizing assistance" rendered "Mulhall's allegations . . . sufficient to support a § 302 claim." *Id.* In reaching this result, the Eleventh Circuit rejected Unite's contention that "all neutrality and cooperation agreements are exempt from the prohibitions in § 302." *Id.*

SUMMARY OF ARGUMENT

Section 302(a)(2) prohibits employer payment or delivery of "any money or other thing of value . . . to any labor organization," save as permitted by Section 302(c). Information about nonunion employees, use of private property for organizing, and control over employer communications regarding unionization are each "things" of great "value" to unions. None of them are exempt under 302(c). When an employer

provides those three things to a union in exchange for valuable consideration, it has "paid" and "delivered" them.

Unite and its amici nonetheless insist that, whatever the statute's plain language may provide, organizing assistance is not forbidden by Section 302 because it "implicates none of the concerns animating" the provision. S.G. Br. 30. That is quite wrong. The experience of the last two decades demonstrates that unions have been willing to sacrifice employee interests—such as by agreeing in advance to make wage and other concessions at the expense of employees they seek to unionize—to obtain the organizing assistance they covet. Enforcing Section 302 in these circumstances thus fulfills Congress' purpose of protecting employees from union self-dealing in collective bargaining. In contrast, to *not* enforce Section 302 here would tear a gaping hole in the statute. It would allow unions to demand from employers the thing many now value most—assistance that helps them sign up more dues-paying members—to the detriment of the employees whom Section 302 is supposed to protect.

Unite and its amici also aver that Section 302 should not be enforced against terms of organizing agreements out of deference to the NLRA. Again, they have it backwards. The entire point of an organizing agreement is to *circumvent* the NLRA's employee protections. Such agreements attempt to silence the robust debate Congress intended to foster with NLRA Section 8(c), to avoid the secret ballot elections favored under NLRA Section 9(c), and to grant unions employer assistance to which they have no statutory right. The NLRA does not help Unite.

Nor is there any merit to Unite's most aggressive claim: that enforcing Section 302 here would mean by extension that union recognition and collective-bargaining agreements themselves will become unlawful. Unite Br. 12, 14-15. Collective bargaining regards the money and things that employers deliver to their *employees*, not to their union representative. Section 302 permits the former, while strictly forbidding the latter to protect employees from conflicts of interest and union self-dealing. Given that unions will compromise employee interests at the bargaining table in exchange for things valuable to the union for organizing, there is every reason to enforce Section 302 pursuant to its unambiguous language.

ARGUMENT

I. UNITE'S DEMANDS FOR ORGANIZING ASSISTANCE VIOLATE SECTION 302's UNAMBIGUOUS LANGUAGE.

"As is true in every case involving the construction of a statute, [the] starting point must be the language employed by Congress." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979). Unite disregards this principle, burying its textual analysis in Part IV of its brief. That is telling.

Section 302 unambiguously bans the exchange of any "thing of value" between an employer and union, subject to a strictly limited set of exceptions. 29 U.S.C. § 186(a). The three types of organizing assistance at issue—data about nonunion employees, use of private property, and a gag clause on employer speech—are each a "thing of value." Each can be "paid or delivered." None is covered by the exceptions in Section 302(c). Given that "a literal construction of this statute does no violence to common sense," *Arroyo*, 359 U.S. at 424, that is the end of the matter.

A. Information, Use of Property, and Gag Clauses Are "Thing[s] of Value."

Section 302(a)(2) makes it "unlawful for any employer . . . to pay, lend, or deliver, *any money or other thing of value* . . . to any labor organization . . . which represents, seeks to represent, or would admit to membership, any of the employees of such employer." 29 U.S.C. § 186(a)(2) (emphasis added). As the Solicitor General correctly recognizes, S.G. Br. 15-17, the three "things" at issue here are "things of value."

1. The word "value" is defined as the "significance, desirability, or utility of something." *Black's Law Dictionary* 1690 (9th ed. 2009). Thus "in the ordinary sense *thing of value* is not limited in meaning to tangible things with an identifiable commercial price tag." *United States v. Schwartz*, 785 F.2d 673, 680 (9th Cir. 1986) (emphasis in original).

The federal courts have recognized as much for decades. "Congress's frequent use of 'thing of value' " in a variety of statutes, including several conflict-of-interest statutes,[9] "has evolved the phrase into a term of art which the courts generally construe to envelop[ ] both tangibles and intangibles." *United States v. Nilsen*, 967 F.2d 539, 542 (11th Cir. 1992); *see, e.g.*, *United States v. Marmolejo*, 89 F.3d 1185, 1191-92 (5th Cir. 1996), *aff'd Salinas v. United*

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[9] "Thing of value" or "anything of value" is used in conflict-of-interest statutes that govern federal officials, 5 U.S.C. § 7353(a), public officials, 18 U.S.C. § 201(b), recipients of federal funds, *id.* § 666, trustees of employee benefit plans, *id.* § 1954, and real estate transactions, 12 U.S.C. § 2607. The term is also used in laws that prohibit conversion of public property, 18 U.S.C. § 641, embezzlement at lending institutions, *id.* § 657, extortion by mail, *id.* § 876(b), procurement of a "thing of value" by false pretenses, *id.* § 912, and robbery and extortion of banks, *id.* § 2113(a)-(c).

States, 522 U.S. 52 (1997); *United States v. Collins*, 56 F.3d 1416, 1419 (D.C. Cir. 1995); *Schwartz*, 785 F.2d at 680; *United States v. Jeter*, 775 F.2d 670, 680 (6th Cir. 1985); *United States v. Girard*, 601 F.2d 69, 71 (2d Cir. 1979); *United States v. Zouras*, 497 F.2d 1115, 1121 (7th Cir. 1974).

That interpretation is "based upon a recognition that monetary worth is not the sole measure of value." *Nilsen*, 967 F.2d at 542-43. Thus the courts have held that internal agency records and information are "things of value." *Girard*, 601 F.2d at 70-71. So are "a promise to reinstate an employee," "an agreement not to run in a primary election," "[t]he testimony of a witness," and "the content of a writing," just to offer a few examples. *Id.* at 71 (collecting cases); *see also* S.G. Br. at 17 n.3 (citing other examples). As the Solicitor General puts it, "[c]ourts have found a wide variety of goods, services, and benefits to be 'things of value' within the meaning of the criminal laws." S.G. Br. 16-17.

"Thing of value" is used the same way in Section 302 as in other statutes. This Court has repeatedly recognized that Section 302's "prohibitions . . . are drawn broadly." *Local 144 Nursing Home Pension Fund v. Demisay*, 508 U.S. 581, 585 (1993); *see Arroyo*, 359 U.S. at 420; *United States v. Ryan*, 350 U.S. 299, 305 (1956). One aspect of that breadth is the phrase "things of value." As the Second Circuit explained: "Congress gave the broadest possible scope to the statute by adding to the word 'money' the words 'or other thing of value,'" because "favors may be conferred in many ways under many circumstances." *United States v. Roth*, 333 F.2d 450, 453 (2d Cir. 1964). The statute's use of the word "any" to modify "thing of value" also indicates "an expansive

meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New Int'l Dictionary* 97 (1976)).

2. The three "things" at issue here fit easily within the phrase "things of value." Indeed, while the statutory phrase is broad enough to capture items without monetary value, *see infra* at 18-21, the Court need not go that far here, because the types of things at issue in this case are commonly bought and sold.

First, Unite demands lists of confidential information about Mardi Gras' nonunion employees. Pet. App. 67-68. "Confidential business information has long been recognized as property." *Carpenter v. United States*, 484 U.S. 19, 26 (1987). And courts regularly hold that information is a "thing of value" under the federal statutes discussed above. *See, e.g.*, *United States v. Jordan*, 582 F.3d 1239, 1246-47 (11th Cir. 2009); *United States v. Barger*, 931 F.2d 359, 368 (6th Cir. 1991); *United States v. Sheker*, 618 F.2d 607, 609 (9th Cir. 1980); *Girard*, 601 F.2d at 71.

The particular type of information at issue here—lists of people, with contact information and other data about them—has both objective and monetary value. Organizations commonly purchase such lists so they can solicit the listed individuals to buy their products or support their cause. *See, e.g., Trans Union Corp. v. F.T.C.*, 245 F.3d 809, 811-12 (D.C. Cir. 2001). So too here, Unite values information about Mardi Gras' employees because it facilitates the union's ability to solicit those employees, including by sending union organizers to employees' homes. Pet. App. 68; *see also Pichler v. UNITE*, 228 F.R.D. 230, 236-37 (E.D. Pa. 2005), *aff'd*, 542 F.3d 380, 383-84 (3d Cir. 2008) (Unite's parent union

sought and compiled information about employees it wanted to organize by, among other means, illegally "tagging" employees' license plate numbers and accessing their motor vehicle records).

Second, Unite demands that Mardi Gras let it use the company's private property to solicit Mardi Gras' employees. Pet. App. 68-69. The right to use physical facilities is a quintessential property right, *cf. Truax v. Corrigan*, 257 U.S. 312, 327 (1921), and is a "thing of value" under any construction of that term. *See NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849, 856 & n.4 (5th Cir. 1986) (use of in-plant office a "thing of value" under Section 302(a), but exempted by 302(c)(1) because union officials using the property were company employees); *see also Marmolejo*, 89 F.3d at 1191-94; *United States v. Freeman*, 208 F.3d 332, 341 (1st Cir. 2000). Indeed, it is akin to a right-of-way, which this Court has long acknowledged to be a property interest with value, including monetary value. *See Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 302 (1976). And of course, many organizations pay to use property such as retail space or convention booths so they can solicit prospective customers. *See, e.g., Gibson v. F.T.C.*, 682 F.2d 554, 558 (5th Cir. 1982).

The facts of this case underscore the point. Mardi Gras "hosts groups and group events on its property." Pet. App. 65. And the organizing agreement contemplates that other enterprises may do business in Mardi Gras' racetrack-casino pursuant to contracts, leases, or franchise agreements. *Id.* at 83. The right to use these facilities is plainly a thing of value.

Third, Unite demands that Mardi Gras commit to "not do any action nor make any statement that will directly or indirectly state or imply any opposition"

to Unite. *Id.* at 69. Control over another party's speech is a "thing of value." *See Nilsen*, 967 F.2d at 542-43 (testimony of adverse witness that defendant wished to silence a "thing of value" under 18 U.S.C. § 876(b)); *Zouras*, 497 F.2d at 1121 (same). It is a thing with monetary value that is often the subject of business contracts. "[P]rivate gag orders appear to be fairly common" when businesses are sold, *EEOC v. Severn Trent Servs.*, 358 F.3d 438, 440 (7th Cir. 2004), and disputes settled, *see, e.g.*, *Rain v. Rolls-Royce Corp.*, 626 F.3d 372, 375 (7th Cir. 2010) (non-disparagement clause between competitors enforceable by liquidated damages of at least $1,000,000 and attorney fees).

Noncompetition agreements that forbid the seller from interfering with the buyer's newly-acquired rights, such as by soliciting customers, are also common when business rights are transferred or sold. *See generally* 45 A.L.R.2d 77 (law on enforceability of such covenants). That sort of agreement is certainly of value to the contracting parties. *See Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 626-27 (1977) (noncompetition agreement entered into in exchange for money and other consideration); *Mayer Hoffman McCann, P.C. v. Barton*, 614 F.3d 893 (8th Cir. 2010) (noncompetition agreement was supported by valuable consideration and enforceable by liquidated damages). In fact, noncompetition agreements are intangible assets whose value is depreciable for tax purposes. 26 U.S.C. § 197(d)(1)(E); *see Recovery Group v. Commissioner of Internal Revenue*, 652 F.3d 122 (1st Cir. 2011) ($400,000 paid for noncompetition agreement must be amortized over 15 year period). Similarly, a noncompetition agreement regarding unionization is something of great value to a union.

A simple example illustrates the value of the three types of organizing assistance here. Assume a company wants to solicit Mardi Gras' employees to buy a product, such as insurance policies. Information about these employees, the right to use Mardi Gras' property to solicit them, and a commitment by Mardi Gras to not speak ill of the product would certainly be things of value to that company. So too are they "thing[s] of value" to Unite.

3. The three "things" at issue here accordingly have value irrespective of the context. But Mulhall actually need not show that much to proceed with his lawsuit. The key point is that the "things" must have value to a labor union like Unite. *Cf. United States v. Ostrander*, 999 F.2d 27, 31 (2d Cir. 1993) (holding under 18 U.S.C. § 1954 that the "thing of value" requirement is fulfilled "if the item received was regarded as a benefit by the recipient, whether or not others might have taken a different view of its value"). The Complaint explains why this organizing assistance has subjective, objective, and monetary value to Unite: it increases the chances that Unite will obtain more dues-paying members and reduces the expense of an organizing campaign. Pet. App. 68-71. Indeed, Unite itself has said as much, alleging in another proceeding that Mardi Gras' failure to honor the organizing agreement would mean "*increased organizing expenses and lost revenues for the Union.*" *Id.* at 71 (emphasis added). Given that the Complaint must be accepted as true on a motion to dismiss, Mulhall has established "value" at this stage of the proceedings.

4. Unite contends that "thing of value" in Section 302 is limited to things with "objective, market-based value." Unite Br. 27. That argument does not even

convince Unite's own amicus. *See* S.G. Br. 15-17. Moreover, it gets the union nowhere even if accepted.

a. Relying on the canon *ejusdem generis*, Unite argues that "money" in Section 302(a) modifies "thing of value" like an adjective, thus limiting "thing of value" to "monetary equivalents." Unite Br. 31-32. That interpretation is untenable because the disjunctive "or" separates "money" and "thing of value" in Section 302(a)—"any money *or* other thing of value," 29 U.S.C. § 186(a) (emphasis added). This Court has made clear that "terms connected by a disjunctive [should] be given separate meanings, unless the context dictates otherwise." *Reiter*, 442 U.S. at 338-39 (rejecting argument that "business" modifies "property" in phrase "business or property"); *accord Garcia v. United States*, 469 U.S. 70, 73 (1984). It likewise has held that the *ejusdem generis* canon applies to "list[s] of specific items separated by commas and followed by a general or collective term," but not to a "*phrase [that] is disjunctive, with one specific and one general category.*" *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 225 (2008) (emphasis added) (refusing to apply canon to the phrase "any officer of customs or excise or any other law enforcement officer").

That precisely describes the phrase at issue here, as the Sixth Circuit recently recognized. In *United States v. Douglas*, 634 F.3d 852 (6th Cir. 2011), the court agreed with the position of the United States that *ejusdem generis* does not apply to Section 302(a). *Id.* at 858. Citing *Ali*, the court held that "thing of value" in Section 302 is not limited to "things of monetary value." *Id.*

Unite next argues that giving "thing of value" a broad meaning will render the word "money" super-

fluous. Unite Br. 31. But the same can be said of Unite's own interpretation. If "thing of value" means "things with market-based value," as Unite believes, the preceding word "money" is still "superfluous" in the sense Unite uses that term. Moreover, Unite's superfluity argument cannot be reconciled with *Ali*. In *Ali*, one could have understood the broad phrase "any other law enforcement officer" to render the preceding enumeration of *specific* law enforcement officers superfluous, and yet this Court refused to narrow the broader term. 552 U.S. at 225. The Court instead recognized that Congress sometimes drafts phrases with "one specific and one general category"; where the phrase is disjunctive, the Court gives full effect to both. *Id.* The same principle applies to Section 302. For example, the word "money" also appears before "thing of value" in 18 U.S.C. § 1954 ("any fee, kickback, commission, gift, loan, money, or thing of value") and 18 U.S.C. § 876(b) ("any money or other thing of value"). Yet, neither statute is limited to monetary value. *See Schwartz*, 785 F.2d at 679-81; *Nilsen*, 967 F.2d at 542.

Finally, construing "thing[s] of value" to require "market-based value," Unite Br. 27, is at odds with Section 302(c)(3), which exempts from the statute's prohibitions "the sale or purchase of an article or commodity at the prevailing market price[.]" 29 U.S.C. § 186(c)(3). This shows that Congress knew how to refer to tangible items with a "market price" when it wanted to do so. If Congress wanted Section 302(a)'s prohibitions to be so limited, as Unite claims, it would have used language akin to that in Section 302(c)(3), and not the far more expansive "thing of value." "It is well settled that '"[w]here Congress includes particular language in one section

of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Duncan v. Walker*, 533 U.S. 167, 173 (2001) (quoting *Bates v. United States*, 522 U.S. 23, 29-30 (1997)).[10]

Unite's market-value argument also is in tension with Section 302's purpose, which is not to prevent unions from becoming wealthy, but to protect employees from union self-dealing and employers from extortion. *See infra* at 30-35. Anything that *a union* values from an employer can lead to these harms. Its market value to third-parties is beside the point.

b. Even if Section 302 required monetary value, which it does not, that would not help Unite. The Complaint alleges that the organizing assistance "will result in a significant monetary benefit to the union," and Unite admits that it incurred "increased organizing expenses and lost revenues" as a result of Mardi Gras' refusal to comply with the organizing agreement. Pet. App. 71. In addition, the fact that "UNITE ultimately spent $100,000 on the initiative campaign . . . suggest[s] that the organizing assistance it bargained for was significant in a monetary sense." Pet. App. 48.

Market value is determined by what a willing buyer and seller will accept to exchange something. *See United States v. Townsend*, 630 F.3d 1003, 1011-12 (11th Cir. 2011) (surveying cases). Here, the "mar-

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[10] For the same reason, that Section 302(d) provides for lesser penalties if the value of the money or thing "does not exceed $1,000," 29 U.S.C. § 186(d), does not import a monetary-value requirement into Sections 302(a) and (b), as Unite claims. Unite Br. 35. Congress did not use that language in the latter sections, which suggests that this omission was intentional.

ket" for organizing assistance consists of Unite and other unions, which often compete to organize employees. *See, e.g., Patterson v. Heartland Indus. Partners, LLP*, 428 F. Supp. 2d 714, 723 (N.D. Ohio 2006) (employer assisted union with organizing its employees and opposed rival union). Thus, the "market value" of Mardi Gras' assistance can be set by what Unite gave in exchange for it—a $100,000 political campaign—and by evidence regarding what Unite and other unions have provided for similar types of assistance in other circumstances.

Moreover, even if the ostensible "market" were limited to entities *other* than unions (which would make no sense under Section 302), market value would still exist here. As previously stated, a company that wished to solicit Mardi Gras' employees to buy a product or service would pay for the types of assistance that Unite demands. *See supra* at 18.

To find "value" not pled here, even under Unite's unduly pinched "market-based value" approach, the Court would have to accept that the three types of assistance at issue are not worth even one dollar. Given that Unite and other unions aggressively seek this assistance from employers, provide consideration for it, and use it to increase their membership ranks (and concomitantly their treasuries), that conclusion is impossible. Employer assistance with gaining more members has great "value" to unions, no matter how that term is construed.

B. Organizing Assistance Can Be Both "Paid" And "Delivered" under Section 302.

The three items at issue are not only "things of value." 29 U.S.C. § 186(a). They also fulfill the other statutory requirements because they can serve as a

"payment," and can be "deliver[ed]," to a union. *Id.* §§ 186(a), 186(b)(1). The contrary arguments of Unite and its amici miss the mark.

1. *Organizing Assistance Can Be a "Payment."*

a. The Eleventh Circuit correctly held that organizing assistance can be a "payment" to a union under Section 302 because it "fulfills an obligation." Pet. App. 8-9. "Payment" is defined as "[p]erformance of an obligation by the delivery of money *or some other valuable thing* accepted in partial or full discharge of the obligation." *Black's Law Dictionary* 1243 (9th ed. 2009) (emphasis added). An employer can "pay" a union for its performance of a task, such as conducting a political campaign (as here), or making wage and benefit concessions (as in *Adcock*), with in-kind services just as easily as it can with money.

The three types of organizing assistance here are naturally understood as "payments." Mardi Gras agreed to give Unite these "thing[s] of value" in exchange for it conducting a political campaign and agreeing to not picket the employer. The organizing assistance is thereby a "valuable thing" that Unite accepted as consideration. *Black's Law Dictionary*, *supra*. It accordingly is a payment. And that does no violence to the language. One can say, in common parlance, that "Party A paid Party B for his service by giving him confidential information," or a right-of-way,[11] or a non-competition agreement, just as easily

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[11] There is no question that one party could "pay" another by giving the second party a right of way or easement; courts have used that terminology for well over a century. *See, e.g., Feeney v. Chester*, 63 P.192, 193 (Idaho 1900) ("[t]he defendant . . . paid the consideration by giving the right of way for the ditch through his land "); *In re Flint & P.M.R. Co.*, 63 N.W. 303, 304

as one can say that "Party A paid Party B by giving him football tickets," or a hotel room, or stock, or any of the other "monetary equivalents" that Unite acknowledges would fall within Section 302's prohibition, Unite Br. 31.

b. Unite opposes this conclusion, but its brief supports Mulhall's position. Unite begins by conceding that "it is possible to interpret 'payment' figuratively as any fulfillment of an obligation." *Id.* at 29. It then tries to walk back that fatal concession by proffering a handful of dictionary definitions of "payment"—but every definition Unite cites actually reaches the organizing assistance at issue here. One provides that payment is performance of an obligation "'by the delivery of money *or other value*,'" while the others say payment involves the delivery of money, "'*services*,'" or "'*some other thing*.'" *Id.* at 29-30 (emphases added). How these definitions help Unite is a mystery. At most, they make Unite's "payment" argument rise or fall with its "thing of value" argument, which is insubstantial for the reasons set forth above.

2. *Organizing Assistance Can Be "Delivered."*

a. The organizing assistance at issue here can also be "delivered." "Delivery" is "[t]he formal act of transferring something, such as a deed; the giving or yielding possession or control of something to another." *Black's Law Dictionary* 494 (9th ed. 2009); *see Webster's Dictionary* 481 (unabridged) (2d ed. 1980) ("to give or transfer; to put into another's possession or power, to commit, to pass from one to another"). In

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(Mich. 1895) (parties "paid the notes" they had granted to their counter-parties "by granting rights of way").

the context of Section 302, it refers to that which a union can "receive" or "accept." 29 U.S.C. § 186(b)(1).

Contrary to the opinion of the court below, the term "deliver" applies to more than "tangible items." Pet. App. 7. For example, it is commonly said that a person or entity "delivers" a service, *see, e.g., Nixon v. Missouri Municipal League*, 541 U.S. 125, 135-37 (2004) (using phrases "deliver electric and water services" and "deliver telecommunications service"), or "delivers" a communication. Indeed, this Court's opinions start by saying that a certain Justice "delivered the opinion of the Court."

Turning to the things at issue here, a list of information about employees obviously can be delivered; it is a tangible document or electronic file. *See, e.g., Young Sun Shin v. Mukasey*, 547 F.3d 1019, 1023 (9th Cir. 2008) ("Sustaire's attorney delivered the list to the Department of Homeland Security"). Indeed, Unite's organizing agreement states that "the Employer will *furnish* the Union with a complete list of employees" and that "the Employer will *provide* updated complete lists monthly." Pet. App. 81 (emphases added). Mardi Gras actually delivered such a list to Unite on at least two occasions. J.A. 46.

Mardi Gras also can "deliver" the right to use its property and control over its communications to Unite, as both result in "giving or yielding possession *or control* of something to another." *Black's Law Dictionary* 494 (9th ed. 2009) (emphasis added). The organizing agreement states that it is enforceable by arbitration. Pet. App. 81. It accordingly provides Unite with the right to use portions of Mardi Gras' property, like the right transferred in rental agreements, and the right to control the employer's communications, like the right often transferred in

confidentiality and noncompetition agreements.[12] The notion that one can "deliver" such control to another is consistent with long-established English usage. *See, e.g.*, *Atlanta, K. & N. Ry. v. Southern Ry.*, 153 F. 122, 123 (6th Cir. 1907) (court erred in requiring a railway "to *deliver possession of the disputed right of way* and desist from interfering with the use and occupation of same") (emphasis added).

The organizing assistance also can be thought of as a valuable service by Mardi Gras that is susceptible to delivery. For example, if Unite hired a consultant to acquire information about employees it wants unionized, set up places to meet with them, and implement a communications campaign that targets them, the consultant could "deliver" these services to Unite. *See Northwest Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 200 (2009) ("Northwest Austin Municipal Utility District Number One was created in 1987 to *deliver city services*") (emphasis added). Here, Unite demands delivery of similar services from Mardi Gras, and the company has delivered many of them.

b. Unite does not bother to contest that one can "deliver" an employee list. Instead, it focuses on the use-of-property clause, arguing that "[a] person can 'deliver' *possession* of property, but only in the sense of formally transferring a title or deed." Unite Br. 28. But that is not the sole meaning of "deliver"; the word also denotes "yielding . . . *control*." *Black's Law Dictionary* 494 (9th ed. 2009) (emphasis added). Unite ignores that portion of the definition. A party

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[12] Unite has actually exercised its control over Mardi Gras' communications. In response to a Mardi Gras flier, Unite obtained an arbitration award compelling Mardi Gras to abide by the agreement's gag clause. *See supra* at 8.

can deliver to another limited control over its property, such as a right of way, just as much as it can deliver permanent control over that property.

The Solicitor General, for his part, concedes that delivery means "yield[ing] . . . control," and further concedes that "providing a list of employees could be described as 'delivering' such a list." S.G. Br. 18. However, he argues that the canon *noscitur a sociis* should be applied to the phrase "pay, lend, or deliver," so as to limit the final term, "deliver" to "a financial transfer focus." *Id.* But the canon is inapplicable because these three verbs do not constitute a self-restricting list. *Cf. Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 288-89 (2010) (word "administrative" in phrase "congressional, administrative, or Government Accounting Office report" not limited by other terms to federal administrative materials). Moreover, even if the canon applied, "pay" or "lend" apply to far more than simply financial transfers, as already demonstrated. *See supra* at 23-24.

Unnaturally restricting "deliver" to only physical things or financial transfers is not only inconsistent with the word's meaning, but also with Section 302's purpose. The statute does not exist to prevent unions from acquiring tangible assets, but to protect employees from union self-dealing and employers from extortion. Union demands for valuable services, uses of property, and intangibles are just as capable of causing these harms as demands for physical possessions. For example, it is just as corrupting for an employer to give union officials use of a vacation property as it is to give them the deed to that property. To limit "deliver" to only physical items would leave a major gap in this conflict-of-interest statute.

Sekhar v. United States, 133 S. Ct. 2720 (2013), is not to the contrary. In *Sekhar*, the government argued that a defendant was "obtaining . . . property from another" under the Hobbs Act, 18 U.S.C. § 1951(b)(2), when he compelled a lawyer to make a recommendation to his government employer. The government's theory was that the "property" the defendant obtained was the lawyer's "intangible property right to give his disinterested legal opinion." 133 S. Ct. at 2727. This Court rejected that theory, pointing out that even if the lawyer *lost* such property, the defendant could not *obtain* it for himself; it was not transferable. *Id.* Here, by contrast, the "things of value" at issue—lists of information, the right to use property, and contractual control over communications—can be transferred, and thus delivered and obtained. *See supra* at 23-26. And Unite seeks to obtain these valuable things for itself and its own use.[13]

In the end, Unite's contention that nothing of value is delivered to a union under an organizing agreement is untenable. Why would unions demand organizing assistance from employers if they cannot receive it? Specifically here, why would Unite conduct a $100,000 political campaign, and then hound Mardi Gras for years, for something unattainable? As its conduct suggests, Unite seeks to "receive" something of value from Mardi Gras under Section 302(b); it follows that that thing can be delivered.

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[13] *Sekhar* also is distinguishable because, unlike Section 302, the Hobbs Act requires that the "property" be something that can be "exercised, transferred, or sold" by the defendant. 133 S. Ct. at 2726.

C. Section 302(c) Does Not List an Exception for Organizing Assistance.

Unite makes no claim that organizing assistance is covered by any of the nine statutory exceptions in Section 302(c). This is significant. That Congress did not exempt organizing assistance means that no such exemption is intended—*expressio unius est exclusio alterius*. Such exemptions cannot be implied into the statute. *See Hillman v. Maretta*, 133 S. Ct. 1943, 1953 (2013). Accordingly, Unite's demands for three "thing[s] of value" from Mardi Gras for organizing its employees violates Section 302's plain language.

D. The "Strict Construction" Doctrine Does Not Help Unite.

As a last-ditch gambit, Unite argues that Section 302 must be construed strictly—which, according to Unite, means that it reaches only monetary equivalents—because it carries criminal penalties. Unite Br. 35. But the rule of lenity "does not apply when a statute is unambiguous." *Salinas v. United States*, 522 U.S. 52, 66 (1997). The phrase "any . . . thing of value" is not ambiguous; it is merely broad. There is no basis to limit it to subcategories of things of value, as this Court has recognized. *See id.* at 58 (rejecting a "federal funds" limitation to a prohibition on government officials accepting "anything of value" because "[t]he statute's plain language fails to provide any basis" for such a limitation).

Unite suggests throughout its brief that Congress could not have intended to make the provision of organizing assistance a federal crime. There are good reasons to question that assertion; as discussed below, unions have engaged in grievous violations of their fiduciary duty in exchange for organizing assistance. And it is common for conflict-of-interest

statutes to contain criminal penalties. *See, e.g.*, 5 U.S.C. § 7353(a); 18 U.S.C. § 201(b); 18 U.S.C. § 666; 18 U.S.C. § 1954. Here, Congress believed the threat to the integrity of collective bargaining serious enough to justify criminal penalties as a prophylactic measure. *See United States v. Ryan*, 232 F.2d 481, 483 (2d Cir. 1956); *United States v. Lanni*, 466 F.2d 1102, 1104-05 (3d Cir. 1972); S. Rep. No. 98-225 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3477 (stiffening Section 302's criminal penalties to prevent "the buying and selling of labor peace").

Moreover, Section 302 is often civilly enforced against conduct that usually does not lead to criminal prosecution. This includes employer provision of special leave or benefits to union officials, *see e.g.*, *Caterpillar, Inc. v. Int'l Union, UAW*, 107 F.3d 1052, 1056-57 (3d Cir. 1997) (listing similar cases), *cert. granted*, 521 U.S. 1152 (1997), *cert. dismissed due to settlement*, 523 U.S. 1015 (1998), dues deduction practices, *see e.g.*, *Jackson Purchase Rural Elec. Co-op. Ass'n v. IBEW*, 646 F.2d 264 (6th Cir. 1981), and employer contributions to union trust funds, *see e.g.*, *Demisay*, 508 U.S. 581; W.J. Dunn, Annotation, *Civil actions involving union welfare funds subject to § 302 of the Taft Hartley Act*, 88 A.L.R.2d 493 (collecting dozens of civil actions). So too can Section 302 be civilly enforced against union demands for organizing assistance.

II. SECTION 302's PURPOSE SUPPORTS MULHALL'S INTERPRETATION.

Section 302 must be enforced as written against "thing[s] of value" to organizing to prevent two of the three harms the section addresses: "corruption of collective bargaining through bribery of employee representatives by employers" and "extortion by

employee representatives." *Arroyo*, 359 U.S. at 425-26. As established below, to obtain employer assistance with organizing, unions betray the interests of employees and extort employers. The assertions of Unite and its amici that organizing assistance "implicates none of the concerns animating" Section 302, S.G. Br. 30, are demonstrably wrong.

A. Section 302 Must Be Enforced Because Unions Compromise Employee Interests to Obtain Organizing Assistance.

Section 302's primary purpose is "to insure honest, uninfluenced representation of employees." *United Steelworkers v. U.S. Gypsum Co.*, 492 F.2d 713, 734 (5th Cir. 1974); *see also Ryan*, 232 F.2d at 483 ("The chief, if not only, purpose of the section was to put a stop to practices that, if unchecked, might impair the impartiality of union 'representatives.'"); 29 U.S.C. § 186(a)(4) (unlawful for employer to deliver thing of value to union official "with intent to *influence him*" regarding his duties) (emphasis added). Organizing assistance is within the statute's ambit because, just like money or any other thing of value, employers can use it to influence a union's conduct as an employee representative in collective bargaining.

Unite implicitly concedes as much, stating that an "employer always receives consideration for a neutrality agreement" from a union, and that Unite wanted an organizing agreement from Mardi Gras enough "to give up its right to take economic action against the employer." Unite Br. 61-63. Unite misses the point, however, when it argues that this case falls outside Section 302 because its political campaign was not corrupt. *Id.* at 61. The point is that, if an employer's promise of organizing assistance is capable of inducing a union to conduct a $100,000

political campaign, then it is also capable of inducing a union to compromise employee interests in collective bargaining or to sell "labor peace" to the employer (which Unite did here).

In fact, there is a sordid history of unions secretly making wage and benefit concessions at employee expense to obtain employer assistance with organizing more employees. *See, e.g.*, Pet. 72; *Patterson*, 428 F. Supp. 2d at 716 (employer "receive[d] the union's assurance of no strikes and other guarantees related to wages in return for providing the defendant union with worker addresses and by making plant facilities available to the union"); *Dana Corp.*, 356 N.L.R.B. No. 49, at *22-23 (2010) (union agreed to benefit concessions in exchange for organizing assistance), *petition for review denied, Montague v. NLRB*, 698 F.3d 307 (6th Cir. 2012).

Adcock's facts provide a particularly disheartening example. There, to obtain an employer's organizing assistance, the United Auto Workers made massive concessions at the expense of employees it already represented: it agreed to a three-year wage freeze, to cancel their profit-sharing bonus, and to increase employee benefit costs. It also secretly agreed to make wage, benefit, transfer rights, severance, overtime, and other concessions at the expense of any employees it later organized. 550 F.3d at 372.

A union sacrificing employee interests in collective bargaining to receive their employer's assistance with gaining more dues-paying members is an egregious breach of fiduciary duty. *See Aguinaga v. UFCW*, 993 F.2d 1463, 1470-71 (10th Cir. 1993) (union breached duty by secretly agreeing to allow employer to close employees' facility, and pay lower wages after the facility reopened, in exchange for

unionizing the reopened facility). It is as wrongful as an attorney sacrificing a client's interests in exchange for an opposing party's assistance with recruiting more paying clients.

The conclusion is straightforward: organizing assistance is just as capable of influencing a union's conduct as cash payments, and it is therefore within Section 302's intended ambit. In fact, a union accepting "thing[s] of value" from an employer to support its organizing campaigns is functionally indistinguishable from a union accepting money from an employer to pay for its organizing campaigns.

Schwartz is instructive on this point. The court there held that "assistance in arranging for the merger of [two unions]" is a "thing of value" to union trustees of an employee benefit plan under 18 U.S.C. § 1954. 785 F.2d at 679. It reasoned that "[a] violation of trust which is influenced by the offer of an intangible service is no less damaging to trust fund beneficiaries than if the influence was in the form of a cash kickback. The significant factor is that the trustee sufficiently valued the thing offered to compromise his integrity and position." *Id.* at 680. So too here. The "significant factor" is that unions covet employer organizing assistance enough to compromise employee interests in exchange.

B. Section 302 Must Be Enforced to Prevent Unions from Extorting Employers for Organizing Assistance.

Enforcing Section 302 against the "thing[s] of value" at issue here also advances the provision's second purpose: protecting employers from "'extortion or a case where the union representative is shaking down the employer.'" *Arroyo*, 359 U.S. at 426 n.8 (quoting 93 Cong. Rec. 4746 (Sen. Taft)).

Here, in exchange for the organizing assistance, Unite agreed to not "engage in a strike, picketing, or other economic activity." Pet. App. 82. Unite estimates that the "business Mardi Gras would have lost from a boycott" would have been "over $100,000." J.A. 24. Thus, the union sold labor peace to Mardi Gras. That is squarely within Section 302's intended scope. "The legislative history of § 302 demonstrates that the provision was intended to 'prohibit, among other things, the buying and selling of labor peace,' something that the [Agreement] at issue here at least arguably does." *Mulhall I*, 618 F.3d at 1290-91 (Pet. App. 52) (quoting S. Rep. No. 98-225 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3477).

Moreover, since the 1990s unions have increasingly resorted to extorting employers for assistance with unionizing their employees through so-called "corporate campaigns" or "comprehensive campaigns." *See* Brudney, 83 S. Cal. L. Rev. at 738-43. These campaigns involve a wide range of "legal and potentially illegal tactics" including "litigation, political appeals, requests that regulatory agencies investigate and pursue employer violations of state and federal law, and negative publicity campaigns aimed at reducing the employer's goodwill with employees, investors, or the general public." *Smithfield Foods v. UFCW*, 585 F. Supp. 2d 789, 795-97 (E.D. Va. 2008) (quoting *Food Lion, Inc. v. UFCW*, 103 F.3d 1007, 1014 n.9 (D.C. Cir. 1997)); *see Pichler*, 228 F.R.D. at 234-40 (describing corporate campaign for an organizing agreement); Daniel Yager & Joseph LoBue, *Corporate Campaigns and Card Checks: Creating the Company Unions of the Twenty-First Century*, 24 Empl. Rel. L.J. 21 (Spring 1999) (same). The objective is to inflict such severe economic and regulatory

distress that the employer will enter into an organizing agreement to make the union stop.

Union pursuit of organizing assistance is thereby proving disruptive to labor peace. These are unnecessary disruptions manufactured by unions themselves, as the targets of their extortionate campaigns are necessarily employers of employees who have not chosen to support the union (if the employees did, the union could just petition for an NLRB election) and whom the unions could solicit through traditional means. Enforcing Section 302 to stop unions from shaking down employers for "thing[s] of value" for organizing will go far to promote the "labor peace" Congress wished to foster in the LMRA.

C. The Legislative History Supports Section 302's Applicability Here.

1. The legislative history of Section 302 demonstrates two important points favoring the application of the section to organizing assistance.

First, it shows that Section 302's supporters knew it was drafted broadly. *See generally Lanni*, 466 F.2d at 1104-05 (reiterating Section 302's legislative history). For example, the House Report on the 1959 amendment states that the statute makes it "illegal for an employer to pay or deliver *anything of value* to a representative of his employees, except in those instances permitted by subsection (c)." H.R. Rep. No. 86-741 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2318, 2469 (emphasis added). One legislator explained that "under the language of the amendment, it would be unlawful for any representatives of employees . . . to receive *anything of benefit* or value from the management." 92 Cong. Rec. 4900 (Sen. Pepper) (emphasis added). Another stated that "[t]his language clearly goes so far as to make the employer guilty of

violation of the law if he contributed anything to the union for the benefit of the union." 92 Cong. Rec. 4895 (Sen. Wheeler). The list goes on. *See Lanni*, 466 F.2d at 1104-05. This "[l]egislative history confirms that a literal construction of this statute does no violence to common sense." *Arroyo*, 359 U.S. at 424.

Second, the LMRDA's legislative history shows that Section 302 was intended to reach union organizing activities. The Senate Report explains that the statute was amended to apply to any union "which is seeking to represent or would admit to membership any of the employees of the employer," thus closing a loophole a court had opened by holding that Section 302 applied only to incumbent unions that represented an employer's workforce. *See* S. Rep. No. 86-187 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2318, 2330. Section 302's prohibitions were also extended in the LMRDA to reach transactions intended to cause an "employee or group or committee to influence any other employees in the exercise of the *right to organize* or bargain collectively through representatives of their own choosing," 29 U.S.C. § 186(a)(3) (emphasis added), and to any "request" or "demand" for money or thing of value. *Id.* § 186(b)(1). Section 302 was plainly intended to prohibit unions from demanding any "thing of value" from employers whose employees the unions seek to organize.

2. Unite argues that the 1947 and 1959 legislative histories do not specifically mention the three types of organizing assistance at issue here. Unite Br. 36. This says nothing about Congress' intent because unions did not begin seeking such organizing agreements in significant numbers until the 1990s, decades after the legislative enactments at issue. *See*

supra at 5-6.[14] In any event, this Court has rejected relying on an *absence* of legislative history to prove an affirmative point. *See Mansell v. Mansell*, 490 U.S. 581, 592 (1989).

Unite and its amici next argue that Section 302 "was intended, primarily, as a 'stopgap' measure to regulate employer payments to union welfare funds." Unite Br. 37; S.G. Br. 21-22. That was merely one purpose of the provision. Even before the LMRDA amendments, this Court recognized that it cannot "be contended that . . . Congress was aiming solely at the welfare fund problem. Such a suggestion is supported neither by the legislative history nor the structure of the section." *Ryan*, 350 U.S. at 305. The LMRDA amendments remove any doubt that Section 302 is aimed primarily at the conflict-of-interest problem. *See Lanni*, 466 F.2d at 1104-05 (reiterating Section 302's legislative history).

Finally, Unite offers a legislative-history argument remarkable for its chain of logical leaps: according to Unite, (i) the "second purpose" of Section 302 is to prevent extortion, and therefore (ii) "[t]he antecedent of Congress' use of 'any money or thing of value' . . . was common-law extortion," and therefore (iii) Section 302 must be limited to the "wrongful taking of money or some tangible, valuable property." Unite Br. 37-39. This argument is wrong on every count. First, Unite ignores that Section 302 does not use the word "extortion," and has other purposes beyond combatting that practice—namely, preventing inducement of union representatives and protecting trust funds. *See Arroyo*, 359 U.S. at 425-26. Second,

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[14] The Solicitor General says such agreements first appeared in the 1970s. S.G. Br. 28. If so, the point remains the same, as they still post-date the Section 302 amendments in question.

there is "not the slightest indication that section 302 was intended to duplicate state criminal laws." *Id.* at 422. This statute is wholly unlike the Hobbs Act in this respect. *See Sekhar,* 133 S. Ct. at 2725. Third, the offense of extortion is not limited to obtaining tangible things, but broadly extends to services and most intangibles under both common law, *see id.* at 2728 (Alito, J., concurring), and federal law, *id*; *see Nilsen*, 967 F.2d at 542-43 (construing 18 U.S.C. § 876). Unions do engage in extortion when they try to force employers to give them things valuable for organizing their employees. *See supra* at 33-35.

III. ENFORCING SECTION 302 AS WRITTEN LEADS TO NO ABSURD RESULTS.

Unite and its amici claim that a parade of horribles will befall federal labor law if Section 302 is enforced to prohibit employers from providing organizing assistance. Most dramatically, they argue that Section 302 would outlaw many important aspects of the collective-bargaining process, from employer recognition to arbitration to collective-bargaining agreements themselves. These specters are illusory. Enforcing Section 302 here will not conflict with any other labor statute, but will serve only to effectuate federal labor policy.

A. Enforcing Section 302 by Its Terms Does Not Outlaw Voluntary Recognition, Collective Bargaining Agreements, or Common Terms of Such Agreements.

1. *Voluntary Recognition.*

Unite admits that "[t]he complaint does not allege that the employer's promise to recognize the union upon a showing [of] majority status violates § 302." Unite Br. 55. Nevertheless, Unite and its amici argue

at length that giving Section 302 its full meaning will make voluntary recognition unlawful. Not so. If it ever were challenged, employer recognition cannot be prohibited by Section 302's general prohibition because it is specifically permitted by NLRA Section 9(a), 29 U.S.C. § 159(a). "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one." *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974); *see RadLAX Gateway Hotel v. Amalgamated Bank*, 132 S. Ct. 2065, 2070-71 (2012). This is not an issue with organizing assistance, however, because nothing in the NLRA gives unions any right to those "thing[s] of value." *See infra* 45-46.

Unite and its amici also attempt a related gambit: they conflate organizing assistance with voluntary recognition and suggest that if the former is unlawful, the latter will be as well. Unite Br. 54-57; S.G. Br. 26-30. Unite asserts that that conclusion follows because "[v]oluntary recognition is the very object of the neutrality agreement." Unite Br. 54. The Solicitor General does not even offer that fig leaf; he simply conflates voluntary recognition and organizing assistance with no explanation of why that makes sense. S.G. Br. 26-30.[15]

It makes no sense at all. First, that employer recognition is lawful does not mean "any money or other thing of value" delivered to the union during the run-up to that recognition must be lawful. To the

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[15] The Solicitor General also incessantly mischaracterizes organizing assistance as mere "ground rules." This euphemism is inapt. The three things at issue here are not innocuous rules of conduct for an organizing campaign. They are valuable forms of employer assistance that rig the game in the union's favor and dramatically increase its odds of unionizing the targeted employees.

contrary: Section 302 expressly applies to unions that "seek to represent" employees, 29 U.S.C. § 186(a)(2), and makes no exception for things valuable to unions for organizing. In fact, under Section 302, it does not matter *why* Unite values Mardi Gras' assistance. It only matters *that* Unite values it (which it clearly does).

Second, employers can recognize unions that have the voluntary support of a majority of their employees without affirmatively helping the union gain that support. In fact, before the recent rise of top-down organizing, that is how employer recognition usually occurred. Enforcing 302 against organizing assistance simply will not prohibit employer recognition.

2. *Collective Bargaining.*

a. Unite next claims that enforcing Section 302 by its terms will make collective bargaining agreements unlawful. Unite Br. 15. The argument fails because collective bargaining involves a union demanding money and other valuable things for *employees* it exclusively represents, not for the union itself. *See* 29 U.S.C. § 158(d) (defining collective bargaining); *Wallace Corp. v. NLRB,* 323 U.S. 248, 255 (1944). Such demands are perfectly lawful because Section 302(a) "does not prohibit the employee himself from accepting money or other thing of value if it is paid directly to the employee by the employer." 92 Cong. 4891 (Sen. Byrd). And Section 302(c) exempts those employee benefits that result in delivery of something to their union representative that Congress believed should be permissible. This includes employer contributions to union trusts that provide health, retirement, apprenticeship, vacation, holiday, severance, scholarship, child care, housing, and legal-service benefits to employees. *See* 29 U.S.C.

§§ 186(c)(5)-(8). In this manner, Section 302 permits legitimate collective bargaining for employees, while prohibiting union self-dealing.

That explains why Unite is wrong that enforcing Section 302 by its terms would outlaw common provisions of collective bargaining agreements. Unite Br. 12, 14-15, 34. The agreements provide things to employees, and deliver nothing to their union representative under Section 302(a) that is not permitted by Section 302(c).

Grievance and arbitration clauses deliver nothing to a union in and of themselves; they merely provide for a dispute-resolution process. Only if the result of either process requires payment or delivery of something to a union is Section 302(a) implicated, and this result may be exempted by Section 302(c). For example, grievance awards regarding wages owed to a union steward, or contributions properly owed to a union retirement plan, would be exempt under Sections 302(c)(1) and (c)(5).

Union-shop clauses authorized by 29 U.S.C. § 158(a)(3) do not violate Section 302(a) because they require that *employees*, not employers, pay monies to a union. Moreover, Section 302(c)(4) exempts employer deduction of union dues.

Super-seniority and other special benefits for union stewards are exempt under Section 302(c)(1) if the benefit is "for, or by reason of, his service as an employee of such employer." 29 U.S.C. § 186(c)(1). This is often the case, *see Caterpillar*, 107 F.3d at 1056-57 (listing similar cases), but sometimes not, *see National Union of Healthcare Workers v. Kaiser Found. Health Plan Inc.*, ___ F. Supp. 2d. ___, 2013 WL 2645708 (N.D. Cal. June 12, 2013). Where it is

not, such benefits are unlawful. *See id.* (employer granting employees who are union agents special leave to campaign against rival union not exempted by Section 302(c)(1)).

b. The three "things" at issue in this case bear no resemblance to those Unite trots out in its parade of horribles. Unlike permissible terms of collective bargaining agreements that provide benefits to employees, here Unite seeks valuable things from Mardi Gras strictly for *itself*. This self-dealing is incompatible with Section 302 and the collective bargaining process it protects, because it creates the danger that the union and employer will collude to satiate their self-interests at employee expense. That is precisely what occurred in *Adcock* and other cases discussed above, in which unions agreed to make employee wage and benefit concessions as *quid pro quo* for organizing assistance. *See supra* at 31-33.

It is also what occurred here. Mardi Gras and Unite satisfied their respective self-interests—Mardi Gras gained political clout and labor peace, and Unite gained assistance in organizing more dues-paying members—at the expense of Mulhall and his co-workers, who bear the negative aspects of the organizing agreement. These employees will be deprived of information from their employer about the effects of unionization, and be precluded from voting in a secret-ballot election over whether they want Unite as their representative. That self-dealing violates Section 302, and this Court can so hold without imperiling legitimate terms of collective bargaining agreements.

c. If anything, it is Unite's interpretation of Section 302 that threatens the integrity of collective bargaining. Its narrow statutory reading permits unions and

their officials to self-deal with employers both before and during collective bargaining not only for things valuable for organizing, which is bad enough, but also for any other valuable service, use of property, or intangible that is not a "monetary equivalent." Unite Br. 31. That will undermine Congress' intent in Section 302 to prevent "conflict[s] of interest," Pet. App. 52, and ensure complete union fidelity to the employees the union has a fiduciary duty to represent in collective bargaining. Accordingly, Unite's interpretation must be rejected.

B. Enforcing Section 302 by Its Terms Does Not Conflict with the NLRA.

Unite also asserts that enforcing Section 302 by its terms will conflict with the NLRA. Unite Br. 18-24, 48-60. This assertion is rather galling, as the entire point of an organizing agreement is to circumvent the NLRA's employee protections; for Unite to seek safe harbor from Section 302 in the very statute it seeks to supplant is audacious, to say the least. It is also without legal merit. The conflicts Unite identifies are not conflicts at all.

1. *The Section 301 Cases Are Irrelevant.*

Section 301 of the LMRA grants federal courts jurisdiction to enforce "contracts between an employer and labor organization." 29 U.S.C. § 185. Unite argues that Mulhall's interpretation of Section 302 is "at war with settled interpretation" of Section 301 because "[t]here is a long, unbroken line of cases under [Section] 301 enforcing neutrality agreements like the one at issue here." Unite Br. 18-24.

The fatal flaw with this argument is that not one of the Section 301 cases on which Unite relies so much as mentioned Section 302. They instead enforced

organizing or similar types of agreements against other challenges. This includes *Retail Clerks v. Lion Dry Goods*, 369 U.S. 17 (1962), which merely addressed whether courts have subject-matter jurisdiction under Section 301 to enforce labor contracts other than collective bargaining agreements. Mulhall's interpretation of Section 302 thus creates no conflict at all. The mere fact that courts enforced these agreements in the absence of a Section 302 claim does not mean they would reach the same result if Section 302 were raised.

To the extent Unite is arguing that contracts subject to Section 301 are somehow exempt from Section 302's prohibition, the argument is untenable. Section 302 makes it unlawful for employers and unions to "*agree*" to deliver and receive a thing of value. 29 U.S.C. §§ 186(a) & (b) (emphasis added). The prohibition invalidates noncompliant terms of agreements that are otherwise enforceable under Section 301.

For example, collective bargaining agreements are certainly contracts enforceable under Section 301. Yet, "[t]he courts will not enforce an illegal collective bargaining agreement provision" that violates Section 302. *Bugher v. Cons. X-Ray Serv. Corp.*, 705 F.2d 1426, 1435 (5th Cir. 1983). As Senator Byrd, a proponent of Section 302, stated: "the representatives of the employees, which means the union, shall not receive a tribute of this kind, even though it may be provided for in a collective bargaining contract." 92 Cong. Rec. 4893. Similarly here, unions cannot receive a "thing of value" from an employer merely by making it a term of an organizing agreement.

2. *The NLRA Does Not Give Unions Any Right to Organizing Assistance.*

a. Unite also argues that each of the "thing[s] of value" at issue here "has been approved and occupies a long-standing and well-established place in labor law." Thus, Unite suggests, enforcing Section 302 against them would "destabiliz[e]" practice under the NLRA. Unite Br. 48-53.

The argument misses the mark. "By its plain terms . . . the NLRA confers rights only on *employees*, not on unions or their nonemployee organizers." *Lechmere*, 502 U.S. at 532 (emphasis in original). The NLRA does not grant Unite any right to use Mardi Gras' private property for organizing, *id.* at 537-38;[16] to receive employee lists from it before filing a valid election petition with the NLRB, *see Wyman-Gordon Co.*, 394 U.S. at 766; or to control Mardi Gras' speech and actions regarding unionization, *see* 29 U.S.C. § 158(c) (protecting employers' non-coercive speech about unionization). Accordingly, enforcing Section 302 against these three things cannot conflict with the NLRA.

More generally, "labor-peace agreements . . . are not recognized by the [NLRA]." *Metropolitan Milwaukee Ass'n of Commerce v. Milwaukee Cnty*, 431 F.3d 277, 282 (7th Cir. 2005). The Act authorizes collective bargaining *after* a majority of employees choose a union to be their exclusive representative, but not before. *See Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 737-39 (1961). A

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[16] *Lechmere* recognized that, in unusual situations where employees live and work in an extremely isolated setting like a logging camp, employees have a right to be visited on company property by union agents. 502 U.S. at 539-40. That is not the situation at Mardi Gras' racetrack.

special exception is made only for the construction industry, 29 U.S.C. § 158(f), which proves the general rule. Although organizing and other pre-recognition deals are not necessarily illegal under the NLRA—it depends on their specific terms—nothing in the NLRA affirmatively authorizes them.

b. Unite, however, claims that enforcing Section 302 here could prohibit *other* transfers of information, uses of property, and communications that the NLRA requires or permits. Unite Br. 49-54. These claims are unfounded.

First, voter lists distributed in NLRB elections do not violate Section 302(a) because the NLRB, not the employer, delivers the list to the union. NLRB Casehandling Manual ¶ 11312.1. Moreover, even if Section 302(a) were implicated, things that employers must provide to a union pursuant to NLRB orders are exempt under Section 302(c)(2). *See J.P. Stevens & Co. v. NLRB*, 623 F.2d 322, 328 (4th Cir. 1980). Thus, an employer "supplying the Board with information, pursuant to a Board order" does not violate Section 302. *Wyman-Gordon v. NLRB*, 397 F.2d 394, 396 (1st Cir. 1968), *rev'd on other grounds* 394 U.S. 759 (1969).[17]

The NLRB also requires that employers deliver information relevant to collective bargaining to exclusive representatives of their employees under Section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5).

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[17] Unite falsely claims that this Court "considered Mulhall's argument" and "rejected it completely" in *Wyman-Gordon*, 394 U.S. at 767. Unite Br. 14. *Wyman-Gordon* merely held that the NLRB has the authority to order an employer to "submit a list of the names and addresses of its employees for use by the unions in connection with the election." 394 U.S. at 766. The Court did not pass upon any issue relating to Section 302.

See, e.g., Detroit Edison Co. v. NLRB, 440 U.S. 301, 302-03 (1979). This, too, is covered by Section 302(c)(2)'s exemption because this statutory duty is enforceable by court order.[18] Unite's suggestion that "*all* information an employer is required to give a union as part of the bargaining process" would somehow be illegal if Section 302 is enforced by its terms, Unite Br. 53, is demonstrably incorrect.

Second, enforcing Section 302 here will not require that employers bar their employees' union representatives from company property. Section 302(c)(1) generally allows employers to grant union officials who are their employees free use of company property to implement terms of collective bargaining agreements. *See BASF Wyandotte*, 798 F.2d at 856-57. Incidental access for non-employee union officials' provides nothing of value to those officials.

To the extent that a union representative's use of company property goes beyond these boundaries, Section 302 prohibits it, and rightfully so. An employer giving an incumbent union free use of property for its own purposes—such as for internal union administration or conducting political operations—would be giving a "thing of value" to that union, both monetarily and otherwise. It is proper to enforce Section 302 in these circumstances. *Cf. United States v. Schiffman*, 552 F.2d 1124, 1126 (5th Cir. 1977) (union officials receiving discounted rooms from unionized hotel violated Section 302). So doing would

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[18] Even if this exemption did not apply, Section 8(a)(5)'s specific requirements would control over Section 302's general prohibition. *See RadLAX*, 132 S. Ct. at 2071; *Morton*, 417 U.S. at 550-51. This is not an issue here, however, because neither Section 8(a)(5), nor any other term of the NLRA, gives Unite any right to the information it demands from Mardi Gras.

not conflict with the NLRA because the Act does not grant union representatives any right to use an employer's property for their own purposes.

Third, enforcing Section 302 against gag clauses on employer speech will not interfere with employers' free-speech rights or compel them to speak against unionization. Unite Br. 48-49. Employers can unilaterally speak, or not speak, about unionization without fear of violating Section 302 because nothing in that circumstance is delivered to the union. Only when an employer grants a union *control* over its speech is a "thing of value" delivered to the union in violation of Section 302(a).

For example, a business (say Coca-Cola) does not deliver something of value to a competitor (say Pepsi) every time it independently decides not to run advertising or compete in a market. However, Coca-Cola certainly delivers something of great value to Pepsi if it enters into a noncompetition agreement that bars it from advertising or competing against Pepsi in a particular market. The same principle applies here.

Far from impeding NLRA Section 8(c), as Unite claims, enforcing Section 302 to protect employer freedom of speech from union control effectuates Section 8(c)'s purpose of encouraging open debate during organizing campaigns, *see Brown*, 554 U.S. at 68, and facilitating employees' "underlying right to receive information opposing unionization." *Id.* "It is highly desirable that the employees involved in a union campaign should hear all sides of the question in order that they may exercise the informed and reasoned choice that is their right." *NLRB v. Lenkurt Elec. Co.*, 438 F.2d 1102, 1108 (9th Cir. 1971); *see also NLRB v. Pratt & Whitney Air Craft Div.*, 789 F.2d 121, 134 (2d Cir. 1986).

In contrast, gag clauses deprive employees of potentially useful information about unionization. "It is difficult, if not impossible to see . . . how an employee could intelligently exercise [her] rights, especially the right to decline union representation, if the employee only hears one side of the story—the union's." *Healthcare Ass'n v. Pataki*, 388 F. Supp. 2d 6, 23 (N.D.N.Y. 2005), *rev'd on other grounds*, 471 F.3d 87 (2d Cir. 2006). "[H]indering an employer's ability to disseminate information opposing unionization 'interferes directly' with the union organizing process which the NLRA recognizes." *Id.* (citation omitted).

3. *NLRA Section 8 Does Not Help Unite.*

Unite and its amici also contend that Section 302's prohibitions must be narrowly construed to avoid overlapping with Sections 8(a) and (b) of the NLRA. 29 U.S.C. §§ 158(a)-(b). *See* Unite Br. 40, 58. This contention fails both generally and in its particulars.

a. It is common for two or more statutory prohibitions to govern the same conduct. "Redundancies across statutes are not unusual events in drafting, and so long as there is no 'positive repugnancy' between two laws . . . a court must give effect to both." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992).

This principle applies to the interaction of the NLRA and independent federal labor laws, such as LMRA Sections 301-03. Under Section 301, for example, unions can file suit to remedy employer noncompliance with collective bargaining agreements, even though that is also an unfair labor practice under NLRA Section 8(a)(5), 29 U.S.C. § 158(a)(5). And, under LMRA Section 303, 29 U.S.C. § 187, employers can file suit to recover damages resulting from secondary union boycotts that violate

NLRA 8(b)(4), 29 U.S.C. § 158(b)(4), even though unfair-labor-practice charges could also be filed directly under NLRA 8(b)(4). *See ILWU v. Juneau Spruce Corp*, 342 U.S. 237, 244 (1952).

Similarly here, "[b]oth section 302 of the LMRA and section 8 of the NLRA may make similar conduct unlawful, but each provides an independent remedy. Section 8 is a general provision. In section 302 Congress has independently provided a judicial remedy for certain specifically described conduct." *Hospital Employees' Div. of Local 79, SEIU v. Mercy-Memorial Hosp.*, 862 F.2d 606, 608 (6th Cir. 1988), *further proceedings*, 492 U.S. 914 (1989) (judgment vacated on other grounds). Thus, the NLRA does not preempt enforcement of Section 302, even against conduct that the NLRB's General Counsel determines not to violate the NLRA. *Id.*

A contrary conclusion would "effectively repeal section 302 because the conduct proscribed by section 302 is almost always arguably subject to sections 7 or 8 of the NLRA and, therefore, subject to the jurisdiction of the NLRB in an unfair labor practice proceeding." *Id.* Making Section 302 a moribund letter out of deference to the NLRB would be absurd given that Congress deliberately placed the provision outside the agency's jurisdiction. *See BASF Wynadotte Corp.*, 274 N.L.R.B. 978 (1985).

b. More specifically, giving Section 302 its ordinary meaning will not render superfluous Sections 8(b)(4) and 8(b)(7) of the NLRA, which regard secondary boycotts and recognitional picketing, respectively. 29 U.S.C. §§ 158(b)(4), 8(b)(7). Both provisions apply to union conduct that does not violate Section 302, such as a secondary boycott aimed at pressuring an employer to provide better wages to employees or pick-

eting to secure employer recognition after a majority of employees choose to support the union. *See supra* at 38-42. Only secondary boycotts or picketing the objective of which is acquiring *for the union* any nonexempt "money or other thing of value" from an employer will violate 302(b).

But that minor overlap is consistent with "[o]ne of the major aims of the 1959 Act," which was to "limit 'top-down' organizing campaigns in which unions used economic weapons to force recognition from an employer regardless of the wishes of his employees." *Connell Const. Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 632 (1975). "Congress accomplished this goal by enacting § 8(b)(7), which restricts primary recognitional picketing, and by further tightening § 8(b)(4)(B), which prohibits the use of most secondary tactics in organizational campaigns." *Id.* At the same time, Congress also made Section 302 applicable to union organizing by enacting Sections 302(a)(2) and (a)(3). These provisions work together as part of a comprehensive statutory scheme to restrict top-down union organizing. Giving full effect to all of them is consistent with congressional intent.

c. Enforcing Section 302 as written will also not subsume Section 8(a)(2) of the NLRA, which makes it unlawful for employers "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." 29 U.S.C. § 158(a)(2). Section 302 does not overlap with Section 8(a)(2)'s primary prohibition regarding domination and interference, but only its secondary prohibition regarding "support." But this partial overlap, which will exist under *any* reading of the statutes, was understood and accepted during Section 302's enactment. For example, Senator Carl

Hatch explained Section 302's purpose to Senator James Tunnell as follows:

> Mr. HATCH: The Senator is familiar with the provisions of the Wagner Act against contributions, is he not?
>
> Mr. TUNNELL: That purpose is very clear. It is to prevent the employer from controlling the union, as against the employees. There is a sensible explanation for such a prohibition.
>
> Mr. HATCH: Might there not be a similar purpose in the restrictions placed in this amendment?

92 Cong. Rec. 5426; *see also* 92 Cong. Rec. 4893 (Sen Byrd).

Unite avers that enforcing Section 302 here could lead to liability in some cases where there would be no violation of Section 8(a)(2). Unite Br. 58.[19] But that is not grounds for neutering Section 302. To establish a statutory conflict, it is "not enough to show that the two statutes produce differing results when applied to the same factual situation." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976). Indeed, to effectively allow the NLRB to carve exemptions into Section 302 through its interpretation of Section 8(a)(2) would be inconsistent with Congress' decision not to grant the NLRB any jurisdiction over Section 302. If anything, given that Section 302 was enacted after Section 8(a)(2), and is a more specific statute, its provisions have precedence.

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[19] The NLRB has not directly ruled on whether employer assistance provided in an organizing agreement constitutes unlawful support under Section 8(a)(2), but a strong argument can be made that it does. *See* Eigen & Sherwyn, 63 Hastings L.J. at 729-30.

Enforcing Section 302 here will serve only to effectuate the NLRA's "clear legislative policy to free the collective bargaining process from all taint of an employer's compulsion, domination, or influence." *IAM v. NLRB*, 311 U.S. 72, 80 (1940). As *Adcock* and similar cases dramatically illustrate, employers can use promises of organizing assistance to select and control their employees' bargaining representative. "[C]ollective bargaining is a sham when the employer sits on both sides of the table by supporting a particular organization with which he deals." *NLRB v. Penn. Greyhound Lines*, 303 U.S. 261, 268 (1938) (quoting H.R. Rep. No. 74-1147, 18 (1935)).

* * *

Contrary to Unite's claims, the sky will not fall if Section 302 is enforced to prohibit employers from providing organizing assistance. Instead, it will simply mean employers cannot provide organizing assistance—nothing more, nothing less. This result effectuates Section 302's purpose of protecting employees from union self-dealing and employers from extortion. And, it protects the NLRA's representational procedures, particularly its guarantees of free speech, from being subsumed by private union organizing agreements. There accordingly is no call to deviate from Section 302's plain text. "Thing of value" in Section 302 should be interpreted as broadly as it is in other federal statutes, and held to encompass the three things of value at issue here—lists of information, use of property, and a gag clause.

CONCLUSION

The Eleventh Circuit was correct that it is "too broad to hold that all neutrality and cooperation agreements are exempt from the prohibitions in

§ 302." Pet. App. 8. Its decision should be affirmed, except that portion regarding whether intangibles can be "delivered" under Section 302, which should be reversed, and the case remanded for further proceedings.

Respectfully submitted,

WILLIAM L. MESSENGER
Counsel of Record
c/o NATIONAL RIGHT TO
WORK LEGAL DEFENSE
FOUNDATION, INC.
8001 Braddock Rd., Suite 600
Springfield, VA 22160
(703) 321-8510
wlm@nrtw.org

Counsel for Martin Mulhall

September 20, 2013

REPLY BRIEF

No. 12-99

RECORD
AND
BRIEFS

In The

Supreme Court of the United States

UNITE HERE LOCAL 355,

Petitioner,

vs.

MARTIN MULHALL; HOLLYWOOD GREYHOUND TRACK, INC. d/b/a MARDI GRAS GAMING,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY BRIEF

RICHARD G. MCCRACKEN
Counsel of Record
ANDREW J. KAHN
PAUL L. MORE
DAVIS, COWELL & BOWE LLP
595 Market Street, Suite 1400
San Francisco, CA 94105
Telephone: (415) 597-7200
rmccracken@dcbsf.com

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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Respondents' theory enshrines labor-management conflict, reversing the principles of the Labor-Management Relations Act by outlawing voluntary agreements to lay down the economic weapons of self-help that employers and unions possess. Their "plain language" reading of § 302 produces such an unpredictable tangle that they do not agree with each other about what is illegal and are forced to create a series of implied exceptions, previously unknown. They call for a vast expansion of this criminal law's scope, and related RICO litigation, with only the vaguest guideposts.

ARGUMENT

I. Section 302's Text Does Not Support Respondents' Theory.

A. Mulhall's "plain language" reading of § 302 has never been adopted and differs from that of his co-respondent and *amici*.

Respondents' "plain language" arguments founder on the reality that no court – not even a single federal judge – has agreed with their reading of § 302, including this Court in *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) and the court below. *Cf.* Mulhall Opp., at 12, 29; Mardi Gras ("MG") Opp., at 27. Section 302(a)'s scope is unclear to respondents themselves, as they disagree with each other and their *amici*

about what § 302 forbids and about the right test for this determination.

Mulhall's position in some places is that § 302 prohibits all forms of employer conduct that may help labor organizations to organize employees. "Employers cannot provide organizing assistance – nothing more, nothing less." Mulhall Opp., at 53. Elsewhere, however, Mulhall offers the possibility that "organizing and other pre-recognition deals are not necessarily illegal" but this "depends on their specific terms." *Id.* at 46. Voluntary recognition by the employer does not violate § 302, even though it clearly falls within Mulhall's view of § 302(a)'s scope. *Id.* at 38-40. Collective bargaining agreements are fine to the extent they "provide things to employees" but are criminal if they benefit the union institutionally, under some unspecified test. *Id.* at 40-41. An employer commits a crime if it gives union organizers access to its property before recognition, but giving the same organizers access afterwards is not. *Id.* at 47.

While Mulhall attacks only three provisions in the agreement and concedes that the voluntary recognition clause is legal, Mardi Gras views the entire agreement as a § 302 violation, MG Opp., at 8, including voluntary recognition and arbitration. *Id.* at 18-19, 27. Mardi Gras does not address why it committed what it now claims is a plain violation of a criminal statute. *Cf. id.* at 5.

Amici Council on Labor Law Equity ("COLLE") and National Federation of Independent Business

("NFIB") believe that whether a neutrality agreement is a "thing of value" paid or delivered to a union depends on the means that the union uses to get it. COLLE Br., at 3, 18; NFIB Br., at 2. Section 302's meaning and enforcement would turn on whether the union violated *another law*. COLLE Br., at 4-5.

B. As used in § 302, the term "thing of value" does not extend to waivers of rights or "things" lacking ascertainable market value.

1. Respondents' definition of the term "other thing of value" is boundless. It encompasses anything – any tangible item, any intangible, any service or form of cooperation – that is of "significance, desirability, or utility" to the union. Mulhall Opp., at 13; MG Opp., at 8. There is no authority under § 302 for this reading of the statute. Pet. Br., at 41-44. Mardi Gras carries the notion to its logical conclusion: anything that "serve[s] as the consideration for the union's contractual obligations" is a "thing of value." MG Opp., at 20. A contractual no-lockout promise to a union satisfies this test, as does a garden-variety arbitration clause. It is not credible to argue that Congress intended to criminalize such things.

Elsewhere, Mulhall (but not Mardi Gras) pulls back and contends that the challenged provisions have "monetary value" because they might save the union organizing expenses and later lead to dues-paying members. Mulhall Opp., at 18; *cf.* MG Opp., at

19, 21. In this vision of § 302, "value" may be speculative, dependent on savings from avoiding an employer's hypothetical anti-union campaign, on the decision of the employer's workers to authorize representation, and on their subsequent decision to pay union dues. The mere possibility that a union will derivatively receive money from someone other than the employer suffices. *Cf. United States v. Sekhar*, ___ U.S. ___, 133 S.Ct. 2720, 2728 (2013) (Alito, J., concurring) (Hobbs Act's "term 'property' plainly does not reach everything that a person may hold dear; nor does it extend to everything that might in some indirect way portend the possibility of future economic gain.").

Finally, Mulhall claims that there is in fact "market-based" value to the challenged provisions. Mulhall Opp., at 15. He does not point to any actual market, relying instead on inapt analogies to commercial practices. Mardi Gras more forthrightly admits that "there does not appear to be a recognized marketplace for . . . union organizational assistance[.]" MG Opp., at 21.

2. As used in § 302, the phrase "any money or other thing of value" is limited to money and property of ascertainable, market-based value. This definition fits contemporary meanings of the words, as well as the common-law origin of the phrase. BLACK'S LAW DICTIONARY 1727 (3d ed. 1933) ("Things. The most general denomination of the subjects of property, as contradistinguished from *persons*.") (citing 2 BLACKSTONE'S COMMENTARIES 16); XI OXFORD ENGLISH

DICTIONARY 309 (Oxford: The Clarendon Press 1933) (Thing: "A piece of property, an individual possession; usually in *pl.*, possessions, belongings, goods."); *Sekhar*, 133 S.Ct. at 2724 ("Extortion required the obtaining of items of value, typically cash, from the victim. . . . It did not cover mere coercion to act, or to refrain from acting.").

Responding to the problem posed by § 302's criminal penalty provision, Mulhall reasons that the fact that Congress "did not import" the penalty provision's monetary-value distinction into § 302(a) and (b) shows that "this omission was intentional." Mulhall Opp., at 21 n.10. But this makes no sense: § 302(d)'s monetary-value-based penalties apply to *all* violations of § 302(a) and (b). Congress amended the provision to increase the criminal penalties for "payoffs and bribes." S. REP. NO. 98-225, 227 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3477. If Congress had understood § 302(a) to extend to any "thing" having utility to the union, it would not have based the penalties on the dollar "value of . . . the thing of value involved." 29 U.S.C. § 186(d).

To Mulhall, however, "market value . . . is beside the point." Mulhall Opp., at 21. "Anything that a union values from an employer" is harmful. *Id.* (emphasis omitted). A compliment, a handshake, good reputation – every form of good relations is suspect.

3. According to Mulhall, "thing of value" is a "term of art" whose reach must be the same regardless of statutory purpose or context. Mulhall Opp., at

13. Respondents' treatment of the phrase in isolation from § 302's context and the rest of the LMRA is unsound. *See Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, ___ U.S. ___, 133 S.Ct. 2517, 2530 (2013); Pet. Br., at 44-47.

C. Mulhall's expansive definitions of "pay" and "deliver" do not work.

Mulhall disagrees with the Eleventh Circuit's conclusion that neutrality, access, and employee contact information are not things that can be "delivered." Mulhall Opp., at 25. He agrees with the court below that there may be a "payment" but he cites a dictionary definition of "payment" stating that it is the "*delivery* of money or some other valuable thing." *Id.* at 23. As the Eleventh Circuit reasoned correctly, neutrality, access, and information are not "delivered" because the employer never parts with possession of them. *Cf. id.* at 27; Pet. App. 7. For Mulhall, however, a "delivery" occurs whenever an agreement limits the employer's freedom of action in some way benefiting the union, because the agreement gives the union "control" over the employer's right to act or not act. *See* Mulhall Opp., at 25-26.

According to Mulhall and his *amici*, if an employer remains neutral unilaterally, there has been no "payment" or "delivery" of his silence because the employer has received nothing in return and because the union does not have a contractual means of enforcement. Mulhall Opp., at 48; *see also* NFIB Brief,

p. 21 n.16 (applying same reasoning to access). But this means that it is legal for an employer to remain neutral, allow access, and share employee information, but criminal for the employer to condition this behavior on an enforceable promise, including a no-strike pledge from the union.

Equating the making of an enforceable agreement with the "payment" or "delivery" of a thing of value conflicts with the remainder of § 302(a), which makes reaching an agreement unlawful *only* where the parties have "agree[d] to pay, lend, or deliver, any money or other thing of value." Mulhall's definitions of "payment" and "delivery" as the exchange of consideration and the ability to enforce a promise contractually, respectively, read the word "agree" out of § 302.

If an employer's neutrality or grant of access during an organizing campaign does not independently violate § 302, then the employer's agreement to do so cannot be unlawful either.

D. The provisions that Mulhall challenges have no market value and are not "paid" or "delivered" to the union.

1. Mulhall maintains that the "market value" of the provisions is whatever Petitioner exchanged in consideration. Mulhall Opp., at 21. According to Mulhall, the "market" for organizing assistance "consists of UNITE and other unions, which often compete to organize employees." *Id.* at 22. But there is no such

market. Even if other unions were interested in organizing Mardi Gras' employees, § 8(a)(2) of the Act, 29 U.S.C. § 158(a)(2), requires that any arrangements an employer offers to one union also be offered to any other interested union. *See, e.g., Ella Industries*, 295 N.L.R.B. 976, 979 (1989); *Regal Recycling, Inc.*, 329 N.L.R.B. 355, 357 n.15 (1999).

2. **Neutrality.** Mulhall makes a comparison with non-competition agreements to claim that Mardi Gras' promise of neutrality is the "payment" of something with market value. Mulhall Opp., at 17. Employers and unions are not competitors; a union loses its representative status if it competes with the employer. *Bausch & Lomb Optical Co.*, 108 N.L.R.B. 1555 (1954). Mulhall's argument reflects the view that employers and unions must compete for employees' allegiance and it is somehow incumbent on an employer to fight unionization even if it would choose not to. *See* Mulhall Opp., at 48.

Mulhall characterizes what is involved as the 'right to control the employer's communications" and claims that this has been "transferred" to the union. *Id.*, at 25. But Mardi Gras has left itself free to extoll its own virtues. It has only promised not to tell employees how to exercise their choice. Mulhall's *amici* recognize Mardi Gras' promise for what it is – the employer's "waiver" or "forbearance" of its First Amendment rights. NFIB Br., at 14. Such a waiver is not property that is delivered to someone else. *Sekhar*, 133 S.Ct. at 2727.

3. **Access.** There is no meaningful allegation in the complaint that the right to access non-public areas of the hotel for the sole purpose of communicating about unionization has market value. It is not like a conference or hotel room with a market rate that can be reduced or waived, thus effectively transferring money to the union. *Cf.* Mulhall Opp., at 16; *U.S. v. Schiffman*, 552 F.2d 1124, 1126 (5th Cir. 1977) ("The jury could properly have reached the conclusion that the savings resulting to appellant from the special rate was a thing of value demanded by appellant from the hotel.").

Mulhall claims that allowing union representatives on an employer's premises to talk to employees is like a "right-of-way" in real property law. Mulhall Opp., at 16, 23 n.11. The analogy does not work because the agreement simply permits union representatives to have access temporarily to non-public areas of the casino to communicate with employees, with no space reserved to them or even any particular part of the property defined beyond the general limitation of "non-public areas." This is a license, not an easement or right-of-way, and is not an interest in property. *Lodestar Tower North Palm Beach, Inc. v. Palm Beach Televisions Broadcasting, Inc.*, 665 So.2d 368, 370 (Fla. Dist. Ct. App. 1996).

4. **Information.** Mulhall's complaint merely asserts that Mardi Gras employees' names and addresses are "confidential business information." Pet. App. 68. This is insufficient under *Iqbal/Twombly* standards. Mardi Gras does not pretend that its

employees' names and addresses are "confidential business information"; it states only that they are "personal." MG Br., at 18.

The idea that employee names and addresses are "confidential business information" is inconsistent with federal labor law. Employers are required to provide unions the home addresses and telephone numbers of bargaining-unit employees as part of their bargaining duty. *See, e.g., La Gloria Oil & Gas Co.*, 338 NLRB 858, 858 (2003). Prior to a union's recognition, it is an unfair labor practice for an employer to prohibit its employees from soliciting and providing to a union their co-workers' contact information. *See, e.g., Certified Grocers of Illinois, Inc.*, 276 NLRB 133, 138 (1985), *enf. denied on other grounds*, 806 F.2d 744, 746 (7th Cir. 1986). Employee contact information of this kind is not a trade secret. *Van Bourg, Allen, Weinberg & Roger v. NLRB*, 728 F.2d 1270, 1272-1273 (9th Cir. 1984).

There is no evidence that employee contact information has any market value. Mulhall can only point to the market value of *customer* databases and credit information. Mulhall Opp., at 15, citing *Trans Union Corp. v. F.T.C.*, 245 F.3d 809, 812 (D.C. Cir. 2001). There is no kinship between employee contact information and customer data. In the whole history of the NLRA, there is no reported case of a union selling employee contact information. This is true even though lists required under *Excelsior Underwear Inc.*,

156 NLRB 1236 (1966) have been given to unions thousands of times.[1]

II. Respondents' Reading Has Adverse Effects on the LMRA, Which Are Made Worse By Respondents' Rationalizations.

Respondents' theory would have many deleterious consequences for established law under the Act. They explain these away with a mixture of implied exceptions to § 302, new and unexpected interpretations of § 302's real exceptions, novel theories about the nature of collective bargaining, and an acceptance of the criminalization of unfair labor practices and even of constitutionally protected speech.

A. Voluntary recognition

Mulhall concedes that the voluntary recognition clause does not violate § 302. Mulhall Opp., at 39. There is no exception for voluntary recognition in § 302(c), so Mulhall invents an implied exception based on § 9(a) of the Act, 29 U.S.C. § 159(a), claiming that it is more specific than § 302. Mulhall Opp., at 39. Yet § 9(a) does not use the term "voluntary recognition" or any variant of it, nor does it describe this form of recognition.

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[1] Between 1970 and 1990 alone, the NLRB conducted more than 62,000 elections. U.S. Commission on the Future of Worker-Management Relations, Final Report (1994), Federal Publications, Exhibit III-1, at p. 81.

More narrowly, Mulhall's concession underscores the validity of the point Petitioner has made previously. Neutrality, access, and contact information have "value" – even colloquially – only as means to an end: voluntary recognition. Pet. Br., at 54-55. Mulhall's position is that an employer can agree to the greater good of voluntary recognition but cannot agree to anything that makes it easier for the union to get to that point.

B. Collective bargaining agreements

Mulhall's attempt to explain why collective bargaining agreements do not violate § 302 despite the absence of an exception rests on a fundamental misconception of federal labor law. *See* Mulhall Opp., at 41. The employer and the union are the parties to the agreement, and individual agreements with employees are prohibited. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 335-336 (1944). Section 301 provides jurisdiction for "suits for violation of contracts *between an employer and a labor organization*. . . ." 29 U.S.C. § 185(a) (emphasis added).

There is no language in § 302(a) – or the Act generally – on which Mulhall can base his distinction between the delivery of a thing of value to a union "acting in the interests of represented workers" and to a union "acting in its own self-interest," which is the rationale for his implied exception for collective bargaining agreements. *See* Mulhall Opp., at 40. Nor is there any textual basis for distinguishing delivery

of things of value to a union "before recognition" and "after recognition." In fact, Congress added language in 1959 to cover both equally.[2]

On pain of criminal and RICO sanction, employers and unions would have to guess whether a particular contract provision "benefitted the union" or "benefitted employees," with no guidance from prior precedent under either § 301 or § 302, where this distinction has never been made. *See United States v. C.I.O.*, 335 U.S. 106, 142 (1948) (Rutledge, J., concurring) ("Blurred signposts to criminality will not suffice to create it.").

C. Access

Mulhall does not come to grips with an employer's right under *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), to control his property, including letting in union representatives. Of course, under *Lechmere*, in most circumstances the *government* may not force an employer to do this. *See* Mulhall Opp., at 45 n.16. That does not answer the question why § 302 should be construed to make it illegal for an employer to grant access in a private, voluntary § 301 agreement, or the even stranger question how § 302 could be

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[2] Mulhall misrepresents the amendment by stating that "Congress amended the provision . . . to apply *to union organizing activities.*" Mulhall Opp., at 3 (emphasis added). The 1959 amendment extended § 302 to "*labor organizations* . . . which . . . seek to represent . . . any of the employees of such employer. . . ." 73 Stat. 537.

interpreted to make it criminal to allow access to union organizers but perfectly fine to have union representatives come in after a place is organized.

Mulhall's explanation for why union access is alright under collective bargaining agreements is that "[i]ncidental access for non-employee union officials' [sic] provides nothing of value to those officials." Mulhall Opp., at 47. He does not explain to what other activity this access is "incidental" or how it could have no value to the union. These clauses often include access for the purpose of signing employees up as members or collecting their dues, something that has been consistently upheld. *See, e.g., Frontier Hotel & Casino*, 309 NLRB 761, 765 (1992), *ef'd, NLRB v. Unbelievable, Inc.*, 71 F.3d 1434 (9th Cir. 1995). Since Mulhall believes dues collection is unions' uppermost goal, it is hard to see how this access does not come within his concept of a "thing of value."

D. Union security

Mulhall creates another implied exception to § 302 for union-security provisions with the simple, inaccurate statement that "they require that *employees*, not employers, pay monies to a union," Mulhall Opp., at 41, overlooking the fact that employees must pay dues only because the employer has entered into an agreement with the union that includes this requirement. Indeed, the requirement cannot exist unless it is in the agreement. 29 U.S.C. § 158(a)(3); *Bethlehem Steel*, 136 N.L.R.B. 1500, 1502 (1962).

Mulhall would classify a union-security clause as being for the benefit of the union and not employees, so his invention of an exception for it further erodes his interpretation of § 302. The exception for deductions of union dues (§ 302(c)(4)) does not serve Mulhall's needs because it is only about one method of paying dues (which a member might also pay in person or by mail), not the creation of an obligation to be a member or pay dues.

E. Arbitration

Mulhall also admits tacitly that there are no express exceptions in § 302(c) for grievance and arbitration provisions, yet concedes that they are nevertheless permitted by § 302. This is achieved by the extraordinary statement, "Grievance and arbitration clauses deliver nothing to a union in and of themselves; they merely provide for a dispute-resolution process." Mulhall Opp., at 41. The LMRA's central engine for cooperative labor relations is thus reduced to a valueless ephemeron. *Cf. Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 577-578 (1960). Mulhall denies that a promise to arbitrate is paid or delivered to a union but forgets his own definition: that there is payment or delivery if the "thing" is available to the union for its "own use." Mulhall Opp., at 28. The union certainly uses arbitration, even when the employer must be compelled by legal force to participate. It makes decisions on what cases to arbitrate, sometimes over employee objections. *Vaca v. Sipes*, 386 U.S. 171, 189-190 (1967). As with all

arbitration, the union saves money compared to the alternatives for resolving disputes.

F. Employee information

Mulhall creates another implied exception from § 302 for employee contact information. He constructs out of whole cloth a distinction based on whether a union gets the information before or after filing a representation petition. Mulhall Opp., at 45. There is no textual support for this in § 302 or other parts of the Act. If his theory is right, *Wyman-Gordon*, 394 U.S. 759, is wrong.

Mulhall makes two arguments to distinguish *Wyman-Gordon*. Mulhall Opp., at 46. First, the list goes through the NLRB. There is no exception in § 302 for transfers through an intermediary. The law is not circumvented this way. *See U.S. v. Lanni*, 466 F.2d 1102, 1107-1108 (3d Cir. 1972). Second, this is an NLRB rule. True, but there is still no applicable exception in § 302(c). Mulhall tries to force it into § 302(c)(2). This exception was never mentioned by the First Circuit or the Court in *Wyman-Gordon* as the reason why there was no § 302 violation. Section 302(c)(2) refers only to court judgments and arbitration awards; there is no mention of administrative agencies. Section 302(c)(2) has a final clause for settlements, but the employer's obligation to give an *Excelsior* list to a union is not a compromise and there is no "claim, complaint, grievance or dispute" because representation proceedings are considered

non-adversarial. *Marian Manor*, 333 N.L.R.B. 1084 (2001).

Similarly, § 302(c)(2) does not explain why it is allowable for employers to give mountains of information to unions as part of bargaining. *See* Mulhall Opp., at 46-47. Normally, this exchange of information occurs in the ordinary course of employers and unions complying with their legal duty to bargain. There need not even be a grievance. *Audio Eng'g, Inc.*, 302 N.L.R.B. 942, 944 (1991) (citing *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 437-438 (1967)). Most of the time, there is no court judgment, arbitration award, or compromise of a claim or dispute that would bring this salutary bargaining practice within § 302(c)(2)'s exception.

Looking elsewhere for support, Mulhall asserts that the exception is not needed because "Section 8(a)(5)'s specific requirements would control over Section 302's general prohibition." Mulhall Opp., at 47 n.18. Like his similar ploy with respect to voluntary recognition, there is nothing to this. Section 8(a)(5) is anything but specific. It simply says that an employer may not "refuse to bargain collectively with the representatives of his employees. . ." 29 U.S.C. § 158(a)(5).

G. Section 8(a)(2)

Mulhall apparently agrees that his theory would result in nearly all conduct now regulated under § 8(a)(2) becoming § 302 and RICO violations. Mulhall

Opp., at 49. This would be true even if the NLRB found no violation of § 8(a)(2). Mulhall Opp., at 50. He says that this is only a "partial overlap," stating without explanation that there is no overlap with respect to domination of or interference with a labor organization, but only support for it. *Id.* at 51. This is in sharp conflict with his assertion that any "organizing assistance" violates § 302. *Id.* at 53.

Mulhall is certainly right that two statutes may cover the same conduct. Whether they do depends, however, on Congress's intent. In §§ 8(b)(4) and 303 of the Act, Congress made clear that it intended to cover the same conduct under both sections. Section 303 refers explicitly to § 8(b)(4). *Cf.* Mulhall Opp., at 49-50. Mulhall's use of this example undermines his argument because there is no evidence of a similar intent with respect to § 302 and § 8(a)(2).

Mulhall claims to have found such evidence when "Senator Carl Hatch explained Section 302's purpose to Senator Tunnell." Mulhall Opp., at 52. But these comments were uttered in *1946*, not 1947, and were *not about § 302*, but about the never-enacted Case Bill, H.R. 4908, 79th Cong. 2d sess. (1946).[3] Mulhall even leaves out Senator Tunnell's *negative* answer to

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[3] Mulhall omits the date of the Congressional Record volume cited, as he does elsewhere when misrepresenting floor comments about the Case Bill as being about "§ 302." Mulhall Opp., at 35, 36, 40, 44, 52.

Senator Hatch's suggestion: "I do not think so." 92 CONG. REC. 5426 (1946).

Mulhall's other arguments on this subject are that § 302 is more specific than § 8(a)(2) (a dubious proposition and the reverse of his attitude about the specificity of § 302 as compared to §§ 8(a)(5) and 9(a)), and that § 302 was enacted later (which, by itself, is not meaningful – and the same could be said about § 302's relation to § 8(a)(5)). Mulhall Opp., at 52.

H. Sections 8(b)(4) and (7)

Mulhall eliminates the conflict between his thesis and §§ 8(b)(4) and 8(b)(7) of the Act by simply declaring, "Both provisions apply to union conduct that does not violate Section 302. . . ." Mulhall Opp., at 50. This is followed quickly by a partial retraction, that there is a "minor overlap" if conduct regulated by these sections is for the purpose of acquiring something prohibited by § 302. *Id.* at 50-51. Since he claims that any employer assistance to union organizing violates § 302, he has thus conceded that union organizational activity now carefully regulated by §§ 8(b)(4) and 8(b)(7) could be litigated under § 302. *See* Pet. Br., at 58-59; AFL-CIO Br., at 17-22. The conflict is particularly acute given Mulhall's view that he has a private right of action to enjoin violations of § 302. *Cf.* 29 U.S.C. § 160(l); *Solien v. Teamsters, Local 610*, 440 F.2d 124, 129 (8th Cir.), *cert. denied,* 403 U.S. 905 (1971) (NLRB has exclusive power to seek injunction against potential § 8(b)(7) violations).

III. Respondents' Theory Conflicts With The First Amendment.

If Mulhall were right that it is illegal for an employer to agree what it will not say on the subject of union representation, Mulhall Opp., at 17, this would mean that employers and unions are forbidden from agreeing not to disparage each other. It would be true in any context, even accepting Mulhall's erroneous view of collective bargaining agreements, since an employer's non-disparagement promise would benefit the union.

One of the points Respondents regard as most important, reiterated frequently, is the allegation that in exchange for the neutrality agreement, the union agreed to lobby for a law legalizing Mardi Gras's casino business. Mulhall Opp., at 8-10, 22-23; MG Opp., at 22. Petitioner showed why a promise like this, even if it were made, cannot constitutionally furnish any basis for finding a § 302 violation. Pet. Br., at 62-4. Mulhall ignores this error in his argument, which would lead to the extraordinary result that it is a crime for an employer and a union to exchange promises regarding their exercise of First Amendment rights.

Employer neutrality is simply a waiver of speech rights. Correspondingly, unions agree to waive their First Amendment rights all the time, in no-strike clauses that extend to picketing, boycotts, and other communications adverse to the employer's business interests. This is the *quid pro quo* that is the central

object of the Act. *H.K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 108 (1970). These waivers are not "voluntary" in the sense of being gratuitous. It is what the union must give if it wants an agreement.

IV. The Neutrality Agreement Does Not Create Any Of The Risks Addressed by § 302.

The only risk to the integrity of the collective bargaining process Mulhall alleges in his complaint is that unnamed unions might make concessions in exchange for greater ease of organizing. Pet. App. 72. Neutrality agreements are not payoffs to avoid organizing or to induce subpar performance of bargaining and enforcement duties. One of the chief criticisms of unions is that they raise wages and risk making employers less competitive. Derek C. Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394, 1411 (1971); Cynthia L. Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act*, 71 TEX. L. REV. 921, 922-924 (1993). When an employer agrees to make organizing its employees easier, it undeniably takes the risk that it will end up paying its employees more, as Mardi Gras fears it will have to do. MG Opp., at 4. Section 302 was designed to prevent the exact opposite: avoiding the diversion of value away from employees and to the union.

In fact, when Mulhall describes the "history" of neutrality agreements, he explains that employers enter into them in order to stop the union from taking

economic action against them. None of the surveys he cites says that "hopes of getting a favorable deal on wages and benefits" is a reason for entering into an agreement. Mulhall Opp., at 5-6.

Other parts of the Act already deal quite effectively with the risk Mulhall imagines, without private RICO enforcement. *See Adcock v. Freightliner LLC*, 550 F.3d 369, 376 (4th Cir. 2008). An employer may not recognize the union as the exclusive collective bargaining representative until the union *in fact* is the majority representative. *ILGWU v. NLRB (Bernhard-Altmann Texas Corp.)*, 366 U.S. 731 (1961). An employer and a union may not agree on a collective bargaining agreement before the union is the majority representative. *Majestic Weaving Co.*, 147 N.L.R.B. 859 (1964), *enf. denied on other grounds*, 355 F.2d 854 (2d Cir. 1966). Mulhall argues that because employees participate in the negotiation and ratification of a collective bargaining agreement, it is distinguishable from a neutrality agreement. Mulhall Opp., at 12. But the same thing occurs after a union succeeds in getting recognition under a neutrality agreement. Recognition does not lead to the imposition of any terms and conditions of employment but to the collective bargaining process itself, where the union's work is regulated by its fiduciary duty of fair representation. *Humphrey v. Moore*, 375 U.S. 335, 342 (1964). That regulation was at work, and effectively so, in the case Mulhall cites, *Aguinaga v. UFCW*, 993 F.2d 1463, 1470-1471 (10th Cir. 1993).

Mulhall argues that the duty of fair representation needs to be supplemented (or supplanted) by § 302, which he calls a "conflict-of-interest" statute, intended to protect the "fiduciary relationship between the union and employees." Mulhall Opp., at 1-2. The portion of the 1959 Senate Report on which Mulhall bases this claim addressed not § 302 or any other criminal provision, but the "breaches of trust" and "improper conflicts of interest" for which Congress saw need for only the "milder sanction" of non-criminal reporting and disclosure requirements. S. REP. NO. 86-187 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2318, 2330, 2332. The Senate Report reiterated that § 302's purpose is to prohibit criminal "extortion and bribery." *Id.* at 2329.

Mulhall expresses concern that Mardi Gras employees will be deprived of the employer's views on unionization. Mulhall Opp., at 42. Employers have no obligation to provide such views. Pet. Br., at 48-51. Also, Mulhall's § 302 theory reaches well beyond this professed concern: if a union representative were allowed on the worksite to advocate his cause by debating the employer on the desirability of unionization – thereby increasing the flow of information to employees – a crime would be committed.

V. Trading "Labor Peace" For A § 301 Contract Is Not Improper: It Is The Whole Point Of The Act.

Mulhall has a lot of rhetoric about "selling labor peace." *Cf.* Mulhall Opp., at 32, 34. Securing labor peace through collective bargaining and organizing agreements is the very purpose of the law. *Retail Clerks v. Lion Dry Goods, Inc.*, 369 U.S. 17, 27-28 (1962). One of the Act's fundamental policies is freedom of contract. *H.K. Porter*, 397 U.S. at 108. Congress' object was to channel "the passions, arguments, and struggles of prior years" into collective bargaining, with the hope that this will lead to mutual agreement but with the acknowledgement that when this is not possible, conflict including strikes and lockouts may be used as leverage. *Id.* at 103, 109; *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 144 (1976). ("'[T]he use of economic pressure by the parties to a labor dispute is . . . part and parcel of the process of collective bargaining.'") (quoting *NLRB v. Insurance Agents*, 361 U.S. 477, 495 (1960)).

Strikes are protected under LMRA §§ 7 and 13. *NLRB v. International Rice Milling Co., Inc.*, 341 U.S. 665, 672-673 (1951). This includes strikes for recognition. *See, e.g., NLRB v. Clausen*, 188 F.2d 439, 442 (3d Cir. 1951). Economic strikers may be replaced permanently. *NLRB v. Mackay Radio & Telegraph*, 304 U.S. 333, 346 (1938). Employers are allowed to use the lockout. *American Ship Building v. NLRB*, 380

U.S. 300 (1965). Primary and secondary boycotts are constitutionally protected. *Edward J. DeBartolo Corp. v. Florida Building & Construction Trades Council*, 485 U.S. 568 (1988). Picketing to obtain recognition is allowed for up to 30 days when there is a work stoppage and may be conducted with no time limit in the absence of a stoppage. 29 U.S.C. § 158(b)(7)(C); *Smitley v. NLRB*, 327 F.2d 351 (9th Cir. 1964). These are the weapons the union and Mardi Gras agreed *mutually* to lay aside in favor of a peaceful process for organizing and then negotiating a collective bargaining agreement.

Respondents' theory removes the linchpin from the Act. Respondents cannot deny the right to engage in economic combat. They would have the government take away the means to end the combat and leave employers and labor organizations no option but to continue fighting.

VI. Conclusion: This *Criminal* Statute Should Not Be Given The Vast, Vague Expansion Respondents Seek.

Section 302 is a criminal statute. The force of that fact cannot be blunted by arguing that it is "often" civilly enforced. *See* Mulhall Opp., at 30. Mulhall would have the Court "approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." *Cleveland v. U.S.*, 531 U.S. 12, 24 (2000). Section 302's text and purpose, the LMRA's structure, and previously unquestioned

precedent in myriad areas of federal labor law demonstrate that Mulhall's view is indefensible. But even if § 302's reach were ambiguous, this Court "has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359-360 (1987). This interpretive guide is "especially appropriate" when the provision is a RICO predicate offense. *Cleveland*, 531 U.S. at 25; *Skilling v. United States*, 561 U.S. 40, 130 S.Ct. 2896, 2932-2933 (2010).

The 1947 Congress favored private resolution of labor matters. It wanted less government intrusion in the ways employers and unions in the private sector settled their affairs. It set certain norms and procedures but then left these private parties to find their own way. It defies belief that a Congress promoting voluntary and private resolution of labor disputes, including representation matters, would criminalize getting to that result.

Respectfully submitted,

RICHARD G. MCCRACKEN
Counsel of Record
ANDREW J. KAHN
PAUL L. MORE
DAVIS, COWELL & BOWE LLP
595 Market Street, Suite 1400
San Francisco, CA 94105

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SUPPLEMENTAL BRIEF

RECORD
AND
BRIEFS

Nos. 12-99 & 12-312

IN THE

Supreme Court of the United States

UNITE HERE LOCAL 355,
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v.

MARTIN MULHALL,
Cross-Petitioner and Respondent,

and

HOLLYWOOD GREYHOUND TRACK, INC. d/b/a
MARDI GRAS GAMING,
Respondent.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MARTIN MULHALL'S SUPPLEMENTAL BRIEF IN RESPONSE TO THE BRIEF OF THE UNITED STATES AS *AMICUS CURIAE*

WILLIAM L. MESSENGER
Counsel of Record
c/o NATIONAL RIGHT TO
WORK LEGAL DEFENSE
FOUNDATION, INC.
8001 Braddock Road
Suite 600
Springfield, VA 22160
(703) 321-8510
wlm@nrtw.org

Counsel for Martin Mulhall

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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MARTIN MULHALL'S SUPPLEMENTAL BRIEF IN RESPONSE TO THE BRIEF OF THE UNITED STATES AS *AMICUS CURIAE*

The Court's review is warranted for two reasons. First, the Circuits are conflicted over whether things valuable to unions for organizing can be a "thing of value . . . to any labor organization" under § 302(a)(2) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186(a)(2). Second, this is an issue of exceptional importance to federal labor policy. The Solicitor General has failed to rebut either point.

I. This Case Is a Suitable Vehicle to Resolve the Conflict Among Circuits

The Eleventh Circuit held that "organizing assistance can be a thing of value" under § 302, and that "it is too broad to hold that all neutrality and cooperation agreements are exempt from the prohibitions in § 302." Pet. 7a-8a. Those holdings directly conflict with *Hotel Employees Union v. Sage Hospitality*, 390 F.3d 206 (3d Cir. 2004), and *Adcock v. Freightliner*, 550 F.3d 369 (4th Cir. 2008), which held organizing assistance exempt from § 302's prohibitions.[1]

In its brief to the Eleventh Circuit in support of rehearing en banc, the United States acknowledged that *Mulhall* "conflicts with the decisions of the Third and Fourth Circuits."[2] The Solicitor General, however, now retreats from that concession. Although acknowledging that the courts' approaches "seemingly diverged," U.S. Br. 13, he asserts that the Eleventh Circuit added an "intent" requirement to § 302 and that the meaning and impact of this requirement is uncertain. *Id.* at 14-15.

Actually, the Eleventh Circuit's rule is straightforward: "We hold that organizing assistance can be a thing of value that, if demanded or given as payment, could constitute a violation of § 302." Pet. 2a. The court did not establish an "improper intent" require-

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[1] Moreover, unlike the Eleventh Circuit's holding, the Third and Fourth Circuits' crabbed construction of "thing of value" generally conflicts with how other courts of appeals construe this term of art under § 302 and other statutes. *See* Mulhall's Mem. in Support of Pet. 5-7.

[2] Brief for the U.S. as Amicus Curiae in Support of Rehearing En Banc at 6, *Mulhall v. Unite Here*, 667 F.3d 1211 (11th Cir. 2012) (No. 11-10594), 2012 WL 6826807.

ment. U.S. Br. 14. Rather, it held that "whether something qualifies as payment depends . . . on whether its performance fulfills an obligation." Pet. 8a. In other words, proof of "valuable consideration," and not motive, is needed to demonstrate that a thing of value is given or demanded as payment. *Id.* Thus, the court's finding that the "$100,000 Unite spent on the ballot initiative that was consideration for the organizing assistance" rendered "Mulhall's allegations . . . sufficient to support a § 302 claim." *Id.*

Mulhall's impact is clear. Section 302 will function as intended, and prohibit unions from demanding that employers provide them with "thing[s] of value" for organizing as an extorted price for labor peace or as a *quid pro quo* for bargaining concessions at employee expense. *See* Mulhall's Mem. in Support of Pet. 12-15; *see also Mulhall I* (Pet. 52a) (holding that Mulhall's allegations against Unite's demands for organizing assistance are within zone of interest § 302 protects because the statute is intended to prevent "buying and selling of labor peace" and protect employees "from collusion of union officials and management") (quotation omitted). Unite's candid admission that "[t]he employer always receives consideration for a neutrality agreement" from a union, Pet. 27, makes clear that the Eleventh Circuit's criteria for showing payment will almost always be satisfied.[3]

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[3] To the extent that the proof necessary to show "payment" complicates the lower court's holding, this can be resolved by granting Mulhall's Conditional Cross-Petition over whether intangible assistance can be "deliver[ed]" under § 302. If it can be delivered—which it can—then it is inconsequential if it also qualifies as a payment.

That *Mulhall* is an interlocutory decision because it arose on a motion to dismiss is no barrier to review. *Adcock* was also decided on a motion to dismiss. 550 F.3d at 373. And both *Adcock* and *Sage* held that terms of organizing agreements cannot violate § 302 as a matter of law. *Id.* at 374; *Sage*, 390 F.3d at 219. Accordingly, this case is an appropriate vehicle to resolve the legal question over which the circuit courts disagree: can things valuable to unions for organizing be a "thing of value . . . to any labor organization" under § 302(a)(2)?

It is both pointless and ill-advised to allow the question presented to "percolate in the circuits," U.S. Br. 15, as the Solicitor General suggests, so that other circuits can "consider the application of § 302 to different types of promises in voluntary recognition agreements." *Id.* It is pointless because these "promises" do not vary significantly. Information about nonunion employees, use of company property for organizing, and gag-clauses on employer speech are three primary types of employer assistance that unions almost always demand in organizing agreements.[4] Waiting for additional courts to address the same issue already squarely addressed by three circuits serves no salutatory purpose. Rather, the delay will only allow uncertainty to fester at the expense of employees who will continue to be subjected to collusive arrangements between their employers and unions that seek to organize them. This Court should resolve the circuit split now.

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[4] *See, e.g.*, Zev J. Eigen & David Sherwyn, *A Moral/Contractual Approach to Labor Law Reform*, 63 Hastings L.J. 695, 721-22 (2012).

II. This Case Presents an Important Question of Federal Law

The Solicitor General has rebutted none of the three reasons why the importance of the Question Presented justifies this Court's review.

First, the Third and Fourth Circuits have done great violence to § 302's plain language by exempting from the phrase "thing of value" personal information about nonunion employees, use of employer property for organizing, and gag-clauses on employer speech. *See* Mulhall's Mem. in Support of Pet. 9-11. Indeed, it is difficult to envision anything more valuable to unions than this substantive employer assistance in gaining more members and compelled fee payers.

The Solicitor General attempts to obscure this reality by incessantly referring to organizing assistance as mere "ground rules." U.S. Br. 2, 8, 10-14. This euphemism is misleading. The three things at issue are not innocuous rules of conduct for an organizing campaign, but tangible forms of assistance designed to rig the game in the union's favor and dramatically increase its odds of unionizing the targeted employees.[5] It would be as absurd to describe a state law that provides only the Democratic Party with free use of state property and lists of all eligible

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[5] A recent law review article found that "[n]eutrality agreements radically change the landscape of union organizing. With the aid of such agreements, unions in one study prevailed in 78% of the situations in which they attempted to organize, compared to only a 46% success rate in contested elections." Eigen & Sherwyn, *supra* n.4, 63 Hastings L.J. at 722. "The difference between 46% and 78% actually understates the effect of the neutrality agreement, in part because the sampled populations for the two figures are different." *Id.*

voters, and that bars the Republican Party from campaigning, as mere "ground rules" for an election.

The Solicitor General attempts a similar gambit by framing the issue as whether "compliance with a voluntary recognition agreement" is lawful. U.S. Br. (i), 11; *see also id.* at 8, 12, 14-15. However, the legality of employer recognition of a union without a secret-ballot election is not at issue here. And the type of agreement under which a union demands a "thing of value" from an employer is irrelevant under § 302. For example, Unite certainly could not lawfully demand "money" from Mardi Gras to support its organizing campaign under § 302 just by making that a term of their recognition agreement. Accordingly, it follows that Unite cannot lawfully demand other "thing[s] of value" from Mardi Gras to support its organizing campaign merely by making it a term of their agreement. Unions and employers cannot skirt § 302's prohibitions simply by agreeing to do so as part of a recognition agreement.

The Solicitor General relies on inapposite labels because he cannot dispute that the three things at issue here—information, use of property, and a gag-clause on speech—are each a "thing of value" within the plain meaning of that term. The United States has consistently taken the position, and the courts have accepted, that the phrase "thing of value" under § 302 and other statutes has an expansive meaning and encompasses these types of things. *See* Mulhall's Mem. in Support of Pet. 5-7 (discussing cases). For example, the United States recently represented to the Sixth Circuit that "thing of value" in § 302 is "construed broadly" and "a clearly defined term of art that is broader than money and includes intangibles," Br. for U.S. 41, *United States v. Douglas*, 634 F.3d

852 (6th Cir. 2011) (No. 07-1695), 2009 WL 1209283; *see id.* at 42-44. The Sixth Circuit agreed and held, in conflict with the Fourth Circuit's decision in *Adcock*, that "value" under § 302 is not limited to monetary worth. 634 F.3d at 858. The Solicitor General's position in this case cannot be reconciled with the government's longstanding position that "thing of value" has an expansive meaning under § 302 and other federal statutes.

Second, immediate review is warranted because, to obtain organizing assistance from employers, unions are sacrificing employee interests in collective bargaining and waging extortionate "corporate campaigns" against employers. Mulhall's Mem. in Support of Pet. 12-15. The Solicitor General does not dispute either harm, and acknowledges that "the purpose of § 302 is to stop 'corruption of collective bargaining through bribery of employee representatives by employers,' 'extortion by employee representatives,' and 'abuse (of power) by union officers.'" U.S. Br. 2 (quoting *Arroyo v. United States*, 359 U.S. 419, 425-26 (1959)). By exempting organizing assistance from § 302, the Third and Fourth's Circuits are clearly undermining the statute's purpose of protecting employees from union self-dealing and employers from extortion.

Finally, the question presented is important because unions have made "top-down" organizing with employer assistance their principal method for organizing in order to circumvent the employee-protections of the National Labor Relations Act ("NLRA"), which favor secret-ballot elections and free speech about unionization. *See* Mulhall's Mem. in Support of Pet. 15-17. The Solicitor General, however, attempts to invert reality by contending that

enforcing § 302 against terms of private organizing agreements could interfere with the role of the National Labor Relations Board ("NLRB"). U.S. Br. 14-15. This is incorrect for a host of reasons.[6]

However, that point need not be addressed at length here because, even if it were true, this ramification would only be reason for granting the writ of certiorari. That is, although the parties disagree on whether enforcing § 302 against things valuable for organizing effectuates federal labor policy (Mulhall's position) or will disrupt it (Unite and the Solicitor General's position), no one disputes that resolution of this question will have profound consequences for American labor law. Accordingly, from either the perspective of employees who seek protection under § 302, or that of unions that seek protection from § 302, this case is worthy of this Court's review, as Petitioner Unite and Respondent Mulhall agree.

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[6] A statutory conflict is impossible because nothing in the NLRA gives unions any right to the three "thing[s] of value" at issue here. *See* Mulhall's Mem. in Support of Pet. 15-16. Whether those things are also illegal under the NLRA is irrelevant, because the mere fact that "two statutes produce differing results when applied to the same factual situation" does not establish a statutory conflict. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976). Moreover, the NLRB does not have exclusive purview over organizing agreements. Section 302 expressly applies to an employer agreement with any union that "seeks to represent" its employees, 29 U.S.C. § 186(a)(2). Congress gave the courts, not the NLRB, exclusive authority to enforce this independent labor statute. *See* 29 U.S.C. § 186(e); *BASF Wynadotte Corp.*, 274 N.L.R.B. 978, 978 (1985), *enforced*, 798 F.2d 849 (5th Cir. 1986).

III. This Case Is Not Moot

The Solicitor General's contention that this case may be moot due to the expiration of the organizing agreement fails because Mulhall's claim is not dependent on this agreement. Mulhall alleges that Unite "has violated § 302(b)(1) by *requesting* and *demanding* that Mardi Gras deliver 'thing[s] of value' to Local 355 in the form of Information, Access, and a Gag-Clause." Complaint ¶ 37 (emphasis added); *see also id.*, Prayer for Relief, A(1) (seeking to enjoin Unite from "requesting, demanding, or receiving" these things). Given that Unite shows no signs of ceasing or rescinding its demands that Mardi Gras assist it with unionizing Mulhall and his co-workers, Mulhall's claim for injunctive relief remains cognizable.

CONCLUSION

For these reasons, notwithstanding the Solicitor General's view of this case, the writ and cross-writ for certiorari should be granted.

Respectfully submitted,

WILLIAM L. MESSENGER
Counsel of Record
c/o NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road
Suite 600
Springfield, VA 22160
(703) 321-8510
wlm@nrtw.org

Counsel for Martin Mulhall

AMICUS CURIAE BRIEF

No. 12-99

In the Supreme Court of the United States

UNITE HERE LOCAL 355, PETITIONER

v.

MARTIN MULHALL, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
MYTHILI RAMAN
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
NICOLE A. SAHARSKY
Assistant to the Solicitor General
JOHN M. PELLETTIERI
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

M. PATRICIA SMITH
Solicitor of Labor
CHRISTOPHER B. WILKINSON
Associate Solicitor
JEFFREY M. LUPARDO
Senior Attorney
Department of Labor
Washington, D.C. 20210

LAFE E. SOLOMON
Acting General Counsel
National Labor Relations Board
Washington D.C. 20570

QUESTION PRESENTED

Whether an employer's compliance with a voluntary recognition agreement between the employer and a labor union, in which the employer agrees to remain neutral on the question of unionization and to provide lists of its employees and access to its facilities, violates Section 302 of the Labor Management Relations Act, 29 U.S.C. 186.

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INTEREST OF THE UNITED STATES

This case concerns whether an employer's compliance with a voluntary recognition agreement between the employer and a labor union, in which the employer agrees to remain neutral on the question of unionization and provide lists of its employees and access to its facilities, violates 29 U.S.C. 186. The Department of Justice enforces the statute's criminal prohibition. The National Labor Relations Board is responsible for administering the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, which includes resolving labor disputes and enforcing labor-management agreements. The United States therefore has a significant interest in the Court's disposition of this case. At the invitation of this Court, the United States filed an amicus brief at the petition stage of this case.

STATEMENT

1. Section 302 of the Labor Management Relations Act of 1947, 29 U.S.C. 186, makes it a crime "for any employer * * * to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value * * * to any labor organization," or officer or employee of such an organization, that represents or seeks to represent the employer's employees. 29 U.S.C. 186(a)(2). The statute also makes it a crime for a labor union "to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a)." 29 U.S.C. 186(b)(1). These prohibitions have several exceptions, none of which directly applies here. See 29 U.S.C. 186(c).

Section 302's purpose is to stop "corruption of collective bargaining through bribery of employee representatives by employers," "extortion by employee representatives," and "abuse [of power] by union officers." *Arroyo* v. *United States*, 359 U.S. 419, 425-426 (1959).

2. Petitioner Unite Here Local 355 (Unite Here) is a labor union that seeks to represent the employees of respondent Mardi Gras Gaming (Mardi Gras), a gaming company in Florida. Pet. App. 14, 65. Respondent Martin Mulhall is an employee of Mardi Gras who opposes unionization. *Id.* at 14-15, 64.

a. In 2004, Mardi Gras and Unite Here entered into an agreement in which Mardi Gras agreed to recognize the union as the collective bargaining representative of its employees based on a card-check procedure, rather than through an NLRB secret-ballot election. Pet. App. 2, 81. Mardi Gras also agreed to provide the union with access to Mardi Gras premises during non-working times; to provide the union with lists of employee names

and addresses; and to remain neutral on the question of unionization during the union's organizing campaign. *Id.* at 79-81. In return, the union agreed not to "engage in a strike, picketing or other economic activity" at a Mardi Gras facility during the life of the agreement. *Id.* at 82. Mardi Gras and Unite Here also agreed to arbitrate any disputes arising out of the agreement. *Id.* at 84. The agreement was to take effect when slot machines were installed at Mardi Gras gaming facilities and remain in effect for four years or until the union negotiated a collective bargaining agreement on behalf of Mardi Gras employees, whichever occurred first. *Id.* at 85.

Mulhall alleges that Unite Here also promised Mardi Gras "to expend monetary and other resources to support a ballot proposition favored by Mardi Gras." Pet. App. 2-3, 66. Unite Here spent more than $100,000 on the campaign to permit installation of slot machines at gaming facilities like those operated by Mardi Gras. See *id.* at 3, 38-39.

b. In 2006, the ballot initiative passed and Mardi Gras installed slot machines at its facilities, thereby triggering the agreement. Pet. App. 14, 38. Unite Here requested that Mardi Gras comply with the agreement. *Id.* at 38. Mardi Gras initially complied but in 2008 refused to provide an updated employee list. *Id.* at 14, 38. Unite Here enforced the agreement through arbitration. See *id.* at 14-15; Arbitration Op. & Dec. 7-12 (Aug. 6, 2009) (0:12-cv-61135-RSR Doc. 1-6 (S.D. Fla. June 7, 2012)); Order 8 (S.D. Fla. Aug. 6, 2010) (0:09-cv-61760-WJZ Doc. 38).

In 2009, Mardi Gras distributed a flier to its employees that the union believed violated the agreement; the union again enforced the agreement through arbitration.

See Op. & Award 1-2 (Apr. 23, 2010) (0:12-cv-61135-RSR Doc. 1-7, at 1-2 (S.D. Fla. June 7, 2012)); Order of Final J. Confirming Arbitration Award 1-2 (S.D. Fla. June 30, 2011) (0:11-cv-60047-WJZ Doc. 11).

In November 2011, Mardi Gras fired several union supporters, and the union once again sought arbitration. Compl. to Compel Arbitration 4-5 (S.D. Fla. June 7, 2012) (0:12-cv-61135-RSR Doc. 1). The district court stayed the proceedings to compel arbitration pending the outcome of this case. See Order on Mot. to Stay 1-2 (S.D. Fla. Dec. 20, 2012) (0:12-cv-61135-RSR Doc. 11). The union also filed charges with the NLRB, alleging that Mardi Gras had engaged in unfair labor practices during an organizing drive; the NLRB agreed. See *Hartman & Tyner*, 359 N.L.R.B. No. 100, 2013 WL 1786895, at *1-*5 (Apr. 25, 2013), pet. for review pending, *NLRB* v. *Hartman & Tyner, Inc.*, Nos. 13-1151 & 13-1199 (D.C. Cir.).

3. In the meantime, Mulhall filed this suit in federal district court, seeking injunctive and declaratory relief to prevent enforcement of the agreement. He contended that by complying with the terms of the agreement, Mardi Gras would "deliver" a "thing of value" to the union in violation of 29 U.S.C. 186(a)(2). Pet. App. 63-65, 67-68. He also contended that by asking Mardi Gras to honor the agreement, the union had "request[ed]" and "demand[ed]" a prohibited "thing of value" in violation of 29 U.S.C. 186(b)(1). Pet. App. 72-74.

The district court dismissed the complaint for failure to state a violation of Section 302. Pet. App. 13-23. Relying on decisions from the Third and Fourth Circuits, the district court held that "the assistance promised in the [agreement] does not constitute a thing of value" within the meaning of the statute. *Id.* at 13 (cit-

ing *Adcock* v. *Freightliner LLC*, 550 F.3d 369 (4th Cir. 2008), cert. denied, 558 U.S. 932 (2009), and *Hotel Emps. & Rest. Emps. Union, Local 57* v. *Sage Hospitality Res., LLC*, 390 F.3d 206 (3d Cir. 2004), cert. denied, 544 U.S. 1010 (2005)). The court explained that "the purpose behind Congress's enactment of § 302" was to prevent corruption of and extortion by union officers, and it found "no indication of [such] corruption or bribery of Unite Here officials" here. *Id.* at 18-19.

4. The court of appeals reversed and remanded. Pet. App. 1-9. The court held that "organizing assistance can be a thing of value that, if demanded or given as payment, could constitute a violation of" Section 302. *Id.* at 2. Although the court declined to decide whether a "thing of value" must have "monetary value," it stated that the term "thing of value" generally includes both "tangibles and intangibles." *Id.* at 4-5, 8 (citation omitted). The court then observed that, although employer neutrality, access to facilities, and employee lists cannot be lent or delivered, they can constitute "payment" if they "fulfill[] an obligation." *Id.* at 7-8.

The court acknowledged that "[e]mployers and unions may set ground rules for an organizing campaign." Pet. App. 8. But in the court's view, these "innocuous ground rules can become illegal payments if used as valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer." *Ibid.* The court therefore remanded for the district court to "determine the reason why Unite and Mardi Gras agreed to cooperate with one another." *Id.* at 9.

Judge Restani dissented. Pet. App. 9-12. In her view, an employer's compliance with a voluntary recognition agreement does not violate Section 302, and "an improper intent on behalf of the union or employer in

demanding or offering the types of concessions at issue" does not "transform[] an otherwise 'innocuous' concession into" a crime. *Id.* at 9-10.

SUMMARY OF ARGUMENT

An employer and a union may agree on procedures for voluntary recognition and ground rules for an organizing campaign, including an employer's provision of access, employee lists, and neutrality. Those terms are legitimate methods of furthering the goals of federal labor law. They do not violate federal criminal law under Section 302 of the Labor Management Relations Act, 29 U.S.C. 186.

A. Voluntary recognition and ground-rules agreements have long been lawful under the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.* The NLRA entitles the employer to a secret-ballot election overseen by the National Labor Relations Board (NLRB). See 29 U.S.C. 159(c)(1), (e). But employers need not exercise that option; they may voluntarily recognize unions upon a showing of majority support such as through a card-check procedure.

In an agreement to recognize a union upon a showing of majority support, the employer and union also may agree to ground rules for an organizing campaign, such as the employer's remaining neutral on the question of unionization and providing the union with employee lists and access to its facilities to communicate with employees. These agreements avoid industrial strife and promote employee free choice, two overriding goals of the NLRA. The NLRB has long recognized that voluntary recognition agreements containing such provisions are valid, and federal courts routinely enforce them.

B. Against this backdrop, Section 302 should not be read to prohibit an employer's facilitation of a peaceful

organizing campaign. Section 302 prohibits the employer from "pay[ing]," "lend[ing]," or "deliver[ing]" "money" or "any other thing of value" to a union or its representatives. The term "thing of value" has a broad meaning that includes both tangible and intangible benefits. But as a matter of ordinary usage, a person would not say that an employer "pays," "lends," or "delivers" compliance with a voluntary ground-rules agreement. In contrast, those terms apply naturally to financial benefits provided to or for the benefit of a union or union official, which is how the government has enforced Section 302. To the extent that Section 302 could be read to apply to elements of a voluntary recognition agreement, Section 302 should not be read in isolation from statutory context, history, and doctrine. Rather, the provision should be construed together with other federal labor laws and not be interpreted to outlaw practices that have long been regarded as lawful and enforced by the NLRB and the courts.

C. Section 302's history and purposes provide no reason to apply it to voluntary recognition agreements like the one here. Section 302 was enacted in 1947 to prevent bribery and corruption in the labor context. Nothing suggests that Congress intended to criminalize voluntary employer-union agreements concerning union recognition and peaceful organizing campaigns.

Indeed, at the same time it enacted Section 302, Congress permitted employers and unions to enter into agreements requiring employees to become union members as a condition of employment. Congress also made employer-union agreements enforceable in federal court. Further, Congress enacted several provisions that presume that an employer may voluntarily recognize a union, and it clarified that an employer has a right

to express its views on unionization. It is difficult to believe that the same Congress that encouraged voluntary resolution of labor-management disputes and permitted agreements that provide benefits to unions also intended to criminalize compliance with a voluntary recognition agreement containing ground rules that facilitate employees' exercise of their rights.

The 1959 amendments to Section 302 reinforce this view. Congress amended the statute to clarify that it applies to unions seeking recognition, as opposed to incumbent unions, but no one suggested that the statute would encompass a voluntary employer-union agreement in the organizing context. If Congress had intended to so drastically change settled law and practice, one would have expected it to say so expressly.

D. Voluntary recognition has been permitted since even before the NLRA was enacted, and voluntary recognition agreements are now well-accepted. Voluntary recognition and ground-rules agreements can benefit employers, unions, and employees by minimizing conflict and ensuring employee access to information during organizing campaigns. And they implicate none of the concerns that led to Section 302's enactment.

A theory that an employer violates Section 302 whenever it provides a valuable benefit to a union to fulfill an obligation would, if accepted, not only call into question agreements like those at issue here but also other agreements that are indisputably lawful under the NLRA, such as collective bargaining agreements that allow plant access or use of employer bulletin boards or e-mail systems. The court of appeals' solution to this problem—to add a specific intent requirement to the statute—has no basis in the statute's text and would be problematic to administer. The court of appeals' expan-

sive view of Section 302 is unprecedented and wrong, and its judgment therefore should be reversed.

ARGUMENT

SECTION 302 DOES NOT PROHIBIT AGREEMENTS SETTING GROUND RULES FOR AN ORGANIZING CAMPAIGN, INCLUDING UNION ACCESS TO EMPLOYEES, PROVISON OF EMPLOYEE LISTS, AND EMPLOYER NEUTRALITY

Employers and labor unions may enter into agreements that provide for voluntary recognition of a union when it establishes majority support. In these agreements, an employer may agree to ground rules for an organizing campaign, such as providing the union with access to its employees and agreeing to remain neutral on the question of unionization, and may in return secure no-strike and no-picketing provisions. Respondent Mulhall asserts that Section 302—a provision designed to stop bribery and extortion in the labor context—criminalizes these agreements. That claim is incorrect.

Voluntary recognition agreements and organizing ground-rules terms promote peaceful labor relations and employee free choice. They have been recognized for decades as lawful under the federal labor laws. Nothing suggests that Congress intended to upend this settled understanding when it enacted Section 302. The contrary approaches of Mulhall and the court of appeals—which lack any precedent in the sixty-six year history of the provision—would seriously destabilize labor-management relations and frustrate Congress's goal of promoting labor peace through voluntary agreement.

A. Voluntary Recognition And Ground-Rules Agreements Have Long Been Lawful Under The NLRA

Federal law regulates labor-management relations to minimize industrial strife. 29 U.S.C. 141, 151. Consistent with that goal, employers and unions may enter

into voluntary agreements establishing procedures for organizing campaigns and union recognition. These agreements, including the particular elements challenged in this case, have long been lawful and have been enforced without exception by the NLRB and the courts.

1. The NLRA, enacted in 1935, "create[d] a national, uniform body of labor law and policy" in order to "protect the stability of the collective bargaining process" and "maintain peaceful industrial relations." *United States* v. *Palumbo Bros.*, 145 F.3d 850, 861 (7th Cir.), cert. denied, 525 U.S. 949 (1998). Congress established a centralized agency, the NLRB, to administer the NLRA and to resolve labor disputes. See 29 U.S.C. 153-156, 160-162.

The NLRA sets out an integrated scheme governing employees, employers, and unions during organizing campaigns, representation elections, and collective bargaining. Section 7 first sets forth the core rights of employees "to self-organization"; "to form, join, or assist labor organizations"; "to bargain collectively"; and "to engage in other concerted activities"; as well as the right "to refrain from any or all of such activities." 29 U.S.C. 157. Section 8 then prohibits certain union and employer "unfair labor practices" that interfere with the rights of employees. 29 U.S.C. 158. Section 9 sets out procedures for union recognition, 29 U.S.C. 159, and the statute provides that, once a union is recognized, both the employer and the union have an obligation to bargain collectively. 29 U.S.C. 158(a)(5), (b)(3) and (d).

Voluntary resolution of labor-management disputes is at the very core of the NLRA. The NLRA is "designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between

unions and employers." *NLRB* v. *American Nat'l Ins. Co.*, 343 U.S. 395, 401-402 (1952). The NLRA does not "compel any agreement whatsoever between employees and employers," or regulate "substantive terms governing wages, hours and working conditions which are incorporated in an agreement." *Id.* at 402. Instead, it provides that, if employees choose to be represented by a union, the union and the employer must engage in collective bargaining. *Id.* at 401. An agreement between an employer and union is enforceable in federal court. See 29 U.S.C. 185.

2. Voluntary agreement is particularly important in the context of union recognition. Voluntary recognition of a union "predates the National Labor Relations Act and is undisputedly lawful under it." *Lamons Gasket Co.*, 357 N.L.R.B. No. 72, 2011 WL 3916075, at *4 (2011) (quoting *Dana Corp.*, 351 N.L.R.B. 434, 436 (2007)). "Almost from the inception of the [NLRA] * * * it was recognized that a union did not have to be certified as the winner of a Board election to invoke a bargaining obligation." *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 596-597 (1969); see, *e.g.*, *NLRB* v. *Fargo Foundry Co.*, 141 F.2d 462, 464-465 (8th Cir. 1944).

While the NLRA entitles an employer to request a secret-ballot election overseen by the NLRB, 29 U.S.C. 159(c)(1) and (e); see *Linden Lumber Div., Summer & Co.* v. *NLRB*, 419 U.S. 301, 305-306 (1974), a secret-ballot election "is not the only method by which an employer may satisfy itself as to the union's majority status." *United Mine Workers of Am.* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 72 n.8 (1956). An employer may agree to recognize a union as the exclusive bargaining representative if the union demonstrates majority support through other means. For example, the em-

ployer may agree to allow the union to demonstrate majority support through a "card check" procedure, where the union provides the employer with "cards signed by a majority of the employees authorizing the union to represent them for collective bargaining purposes." *Gissel Packing Co.*, 395 U.S. at 597.[1]

If an employer voluntarily recognizes a union, it is "bound by that recognition and may no longer seek an election." *Exxel/Atmos, Inc.* v. *NLRB*, 28 F.3d 1243, 1246 (D.C. Cir. 1994). As the NLRB has explained, "voluntary recognition, no less than certification, creates a legally recognized and enforceable relationship between the employer and the recognized representative." *Lamons Gasket Co.*, 2011 WL 3916075, at *5.

3. An employer and a union may enter into a voluntary agreement to ensure an orderly and peaceful organizing process. In such an agreement, in addition to the employer committing to recognize the union based on a showing of majority support without a secret-ballot election, the employer and union may agree on ground rules for the union's organizing campaign. Here, for example, the employer agreed to recognize the union using the results of a 'card check" procedure. To facilitate the employees' exercise of their right to organize or refrain from organizing, see 29 U.S.C. 157, the employer also agreed to provide the union with a list of employees and access to its facilities, so that the union could communicate with employees, and to remain neutral on the question of unionization. Pet. App. 78-82 (agreement in this case). For its part, the union agreed not to strike or picket. *Id.* at 82.

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[1] Although "card check" recognition is typical, other methods may also demonstrate majority support. See *Lamons Gasket Co.*, 2011 WL 3916075, at *4.

Employers have an established right to take each of these actions under the NLRA. First, the NLRA permits an employer to adopt a position of neutrality during a union organizing campaign. The NLRA provides that employers and unions have the right to express their views on the question of unionization so long as the "expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. 158(c); see *Chamber of Commerce* v. *Brown*, 554 U.S. 60, 67 (2008) (explaining that Congress made a deliberate decision to leave noncoercive employer and union speech unregulated). This right includes the right to remain neutral. See, *e.g.*, *NLRB* v. *Virginia Elec. & Power Co.*, 314 U.S. 469, 477 (1941) ("The employer in this case is as free now as ever to take *any side* it may choose on this controversial issue." (emphasis added)); see also *Riley* v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988) (freedom of speech encompasses "the decision of both what to say and what *not* to say").

Second, the NLRA permits an employer to provide a union with lists of its employees. The NLRB has long interpreted the NLRA to require an employer to provide a union with a list of names and addresses of employees in advance of an NLRB election. See *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1239-1240 (1966); see also *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969). The NLRB has explained that "an employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasonable choice." *Excelsior Underwear, Inc.*, 156 N.L.R.B. at 1240. Similarly, in the voluntary-recognition context, an employer may choose to provide employee lists to the union in order to permit employees to be informed about the union's arguments.

Third, an employer may voluntarily allow the union access to its property so that the union can communicate with its employees. "[A]n employer cannot be *compelled* to allow distribution of union literature by nonemployee organizers on his property," this Court has held, absent a situation in which employees "are isolated from the ordinary flow of information." *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527, 533, 540 (1992) (emphasis added). But neither this Court nor the NLRB has ever suggested that an employer would be *prohibited* from doing so. See *NLRB* v. *United Steelworkers of Am.*, 357 U.S. 357, 363-364 (1958) (noting that union may request employers to grant access rights not required by law). Rather, an employer may choose to provide such access to unions wishing to organize employees so long as it does so on a non-discriminatory basis. See *NLRB* v. *Waterman S.S. Corp.*, 309 U.S. 206, 225-226 (1940). Providing such access furthers employees' "right of self-organization" by providing them with an opportunity to "learn the advantages of self-organization from others." *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956).

The NLRB has upheld agreements to recognize a union based on a showing of majority support, finding it "a long-established Board policy to promote voluntary recognition and bargaining," see, *e.g.*, *MGM Grand Hotel, Inc.*, 329 N.L.R.B. 464, 466 (1999), and has found an unfair labor practice when an employer breaches such an agreement, see, *e.g.*, *NLRB* v. *Creative Food Design Ltd.*, 852 F.2d 1295, 1297-1298 (D.C. Cir. 1988). The federal courts also have long enforced voluntary recognition agreements. See 29 U.S.C. 185(a) (permitting suit "for violation of contracts between an employer and a labor organization"); see also, *e.g.*, *Gissel Packing Co.*, 395 U.S. at 595-598; *International Union* v. *Dana*

Corp., 278 F.3d 548, 553-554, 558-559 (6th Cir. 2002). And the Board and the courts have enforced agreements containing terms challenged here. See pp. 29-30, *infra*. These established doctrines form the context for interpreting Section 302 in this case.

B. Section 302 Should Not Be Read To Prohibit An Employer's Facilitation Of A Peaceful Organizing Campaign

Mulhall alleges that it is a crime for an employer, as part of a voluntary recognition agreement, to adopt a policy of neutrality and to provide a union with employee lists and access to its facilities during an organizing campaign. Pet. App. 63-76. Before the decision below, no court had accepted that contention. That body of authority is correct.

1. Section 302 of the Labor Management Relations Act of 1947, 29 U.S.C. 186, makes it a crime for employers and labor unions to engage in certain transactions in the labor-relations context. Subsection (a) provides that no employer may "pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value * * * to any labor organization," or officer or employee of such an organization, that represents or seeks to represent the employer's employees. 29 U.S.C. 186(a)(2). Subsection (b) makes it unlawful "for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value" prohibited under subsection (a). 29 U.S.C. 186(b)(1).

2. The key text is the statute's prohibition on an employer's "pay[ing], lend[ing], or deliver[ing]" any "money or other thing of value" to a labor union or union official or employee. 29 U.S.C. 186(a)(2). The broad phrase "thing of value" has been used in dozens of pro-

visions throughout the United States Code, including several criminal provisions.[2] "Congress'[s] frequent use of 'thing of value' in various criminal statutes has evolved the phrase into a term of art which the courts generally construe to envelop[] both tangibles and intangibles." *United States* v. *Nilsen*, 967 F.2d 539, 542 (11th Cir. 1992) (citing cases), cert. denied, 507 U.S. 1034 (1993); see Pet. App. 4-5. This "broad interpretation" is "based upon a recognition that monetary worth is not the sole measure of value." *Nilsen*, 967 F.2d at 542-543; see *United States* v. *Jeter*, 775 F.2d 670, 680 (6th Cir. 1985) ("Congress'[s] very use of the more expansive 'thing of value' rather than 'property' strongly implies coverage beyond mere tangible entities."), cert. denied, 475 U.S. 1142 (1986). Courts have found a wide

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[2] See, *e.g.*, 18 U.S.C. 201(b)(1) (prohibiting bribery of public officials and witnesses using "anything of value"); 18 U.S.C. 210 (prohibiting bribery to procure appointive office using "any money or thing of value"); 18 U.S.C. 641 (prohibiting embezzlement or theft of "any record, voucher, money, or thing of value" from the United States); 18 U.S.C. 657 (Supp. V 2011) (prohibiting officer or employee of federal credit and lending institutions from embezzling any "moneys, funds, credits, securities or other things of value" belonging to such institution); 18 U.S.C. 666(a)(1)(B) (prohibiting bribery in connection with a federal program with "anything of value"); 18 U.S.C. 875(a) and (d) (prohibiting making kidnapping threat with intent to obtain "any money or other thing of value"); 18 U.S.C. 876(b) and (d) (prohibiting extortion of "any money or other thing of value" using the mail); 18 U.S.C. 1954 (prohibiting bribery in connection with an employee benefit plan with "any fee, kickback, commission, gift, loan, money, or thing of value"); 18 U.S.C. 2113(a)-(c) (prohibiting robbery or extortion to obtain "any property or money" or "other thing of value" from a bank).

variety of goods, services, and benefits to be "things of value" within the meaning of the criminal laws.[3]

But several features of Section 302's text make this statute unique—and a poor fit for the contractual provisions challenged here. Section 302 applies only when an employer "pay[s], lend[s], or deliver[s]" money or a thing of value to a labor union or union officer or employee, or the union or its officer or employee requests such a payment, loan, or delivery. 29 U.S.C. 186(a)(2) and (b)(1). The verbs "pay," "lend," and "deliver" work perfectly to capture transactions with a corrupting potential—but are inapt to describe an employer's compliance with the terms of a voluntary recognition agreement. See *Hotel Emps. & Rest. Emps. Union, Local 57* v. *Sage Hospitality Res., LLC*, 390 F.3d 206, 219 (3d Cir. 2004) (a ground-rules agreement for organizing "involves no payment, loan, or delivery of anything"), cert. denied, 544 U.S. 1010 (2005). "Pay" naturally refers to compensation with money. *E.g.*, *Webster's Third New International Dictionary* 1659 (1993). "Lend" typically refers to providing money or an item for temporary use on the condition it will be returned. *Id.* at 1293. "Deliver" does have a more general meaning of "give," "transfer," or "yield possession or control of" a thing. *Id.* at 597. But the canon of noscitur a sociis, see *Bullock* v. *BankChampaign, N.A.*, 133 S. Ct. 1754, 1760 (2013),

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[3] See, *e.g.*, *United States* v. *Townsend*, 630 F.3d 1003, 1010-1011 (11th Cir.) (relaxed conditions of pretrial detention), cert. denied, 131 S. Ct. 2472 (2011); *United States* v. *Freeman*, 208 F.3d 332, 335, 340-341 (1st Cir. 2000) (cash, loans, and "special treatment" at a "striptease nightclub"); *United States* v. *Marmolejo*, 89 F.3d 1185, 1191 (5th Cir. 1996) (conjugal visits); *United States* v. *May*, 625 F.2d 186, 192 (8th Cir. 1980) (flight time on military aircraft); *United States* v. *Girard*, 601 F.2d 69, 70-71 (2d Cir.) (internal DEA records), cert. denied, 444 U.S. 971 (1979).

suggests a financial-transfer focus for this term as well—for example, delivery of free tickets to a sporting event.[4]

A person would not normally say that an employer "pay[s]," "lend[s]," or "deliver[s]" anything to a union when the employer remains neutral on unionization; the employer has simply exercised its own right to refrain from speaking. Nor would it be natural to say that an employer that allows a union access to its property to address employees "paid," "lent," or "delivered" the property to the union; the employer is exercising its own property rights in deciding who to let onto its property and for what purposes. Although providing a list of employees could be described as "delivering" such a list, the point of providing the list is to give employees the opportunity to hear from the union in order to facilitate "the exercise by the [e]mployees of their rights under Section 7 of the [NLRA]." Pet. App. 79. An employer's provision of a list as part of the ground rules for a peace-

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[4] Other parts of Section 302 similarly suggest a focus on financial transfers. For example, Subsection (c) exempts from the statute's prohibitions certain financial transactions between an employer and union or union representative, such as an employer's payment of a salary to an employee who also serves as a union representative, see 29 U.S.C. 186(c)(1); funds paid or things of value given to satisfy a court judgment or settle a dispute, see 29 U.S.C. 186(c)(2); money deducted from wages as union dues, see 29 U.S.C. 186(c)(4); and employer contributions to trust funds for the benefit of employees, see 29 U.S.C. 186(c)(5)-(8). Further, Section 302's criminal penalties depend on the "value of the amount of money or thing of value involved," 29 U.S.C. 186(d)(1)-(2), which suggests that the value of such thing is readily ascertainable. See *Adcock* v. *Freightliner LLC*, 550 F.3d 369, 375 (4th Cir. 2008) (penalty provision shows that "Congress clearly intended § 302's 'thing of value' to have at least some ascertainable value"), cert. denied, 558 U.S. 932 (2009).

ful organizing campaign falls well outside of the core focus of Section 302.[5]

3. In keeping with the focus of Section 302 on unauthorized financial benefits, prosecutions under the provision have invariably involved the transfer of money or items or services with ascertainable value to unions or union representatives. See, *e.g.*, *United States* v. *Burge*, 990 F.2d 244, 249-250 (6th Cir. 1992) (sham consulting fees), cert. denied, 508 U.S. 924 (1993); *United States* v. *Boffa*, 688 F.2d 919, 935-936 (3d Cir. 1982) (use of an automobile), cert. denied, 460 U.S. 1022, and 460 U.S. 1028 (1983); *United States* v. *Schiffman*, 552 F.2d 1124, 1126 (5th Cir.) (preferentially low rates at a hotel), cert. denied, 434 U.S. 860 (1977); *United States* v. *Fisher*, 387 F.2d 165, 168 (2d Cir. 1967) (construction materials and equipment), cert. denied, 390 U.S. 953 (1968); *United States* v. *Roth*, 333 F.2d 450, 453 (2d Cir. 1964) (an interest-free loan), cert. denied, 380 U.S. 942 (1965). In some cases, the employer transferred money or things of value to a third party at the behest of the union official and the union official received some other benefit. See, *e.g.*, *United States* v. *Douglas*, 634 F.3d 852, 859 (6th Cir. 2011) (wage and benefit payments to friends and relatives of union officials); *United States* v. *Carlock*, 806 F.2d 535, 555 (5th Cir. 1986) (payments to union official's daughter-in-law), cert. denied, 480 U.S. 949, and 480 U.S. 950 (1987); *United States* v. *DeBrouse*, 652 F.2d 383, 387-388 (4th Cir. 1981) (payments to per-

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[5] Mulhall contends (Supp. Cert. Br. 3) that the employer's promises have value because in return for them, the union supported a ballot initiative to permit slot machines. The parties dispute whether a promise to support the ballot initiative was part of the agreement, see Pet. Br. 52-53, but in any event, Section 302 should not be held to bar the terms reflected in the written agreement.

son designated by union representative); *United States* v. *Lanni*, 466 F.2d 1102, 1107-1109 (3d Cir. 1972) (payments to union representative's girlfriend). No prosecution has been based on voluntary recognition agreements or the terms at issue in this case.

4. To the extent that the literal meaning of "pay[ing], lend[ing], or deliver[ing]" any "money or other thing of value" could be construed to reach components of voluntary recognition agreements, Section 302 should be read not in a vacuum, but in light of its origins, the surrounding body of labor law, and the disruptive effects of Mulhall's unprecedented approach. The statute should not be read in a manner that is fundamentally at odds with the accepted premises and core goals of the statutory scheme of which it is a part.

When particular conduct might be regulated under different statutory provisions, this Court has sought to reconcile those provisions, paying particular attention to whether the conduct is regulated by a specialized administrative scheme. See, *e.g.*, *Credit Suisse Sec. (USA) LLC* v. *Billing*, 551 U.S. 264, 275-276 (2007) (finding that securities laws and SEC, rather than antitrust laws and district courts, exclusively regulate certain conduct in public offerings). Similarly, even when a reading of a statute might be "textually permissible in a narrow sense," it may be "structurally implausible," because it would render other statutory provisions "functionally void." *New Process Steel, L.P.* v. *NLRB*, 130 S. Ct. 2635, 2641 (2010). That is the case here. Section 302 should not be interpreted to criminalize agreements that have long been considered lawful under the NLRA because they reduce industrial strife and promote free employee choice. At a minimum, courts should "exercise[] restraint" in reading the text in order to avoid the

significant fair-notice concerns raised by a novel construction that criminalizes practices long regarded as lawful. *United States* v. *Aguilar*, 515 U.S. 593, 600 (1995).

C. The Legislative Record Reveals No Intention To Prohibit Voluntary Recognition And Ground-Rules Agreements

"A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change." *Green* v. *Bock Laundry Mach. Co.*, 490 U.S. 504, 521 (1989). A statute should not be construed to work a fundamental change in established law absent a clear expression of congressional intent. See, *e.g.*, *Scheidler* v. *National Org. for Women, Inc.*, 547 U.S. 9, 20 (2006). The legislative record provides no indication that Congress intended to criminalize voluntary recognition agreements when it enacted Section 302.

1. Section 302 resulted from congressional concern about "corruption of collective bargaining through bribery of employee representatives by employers," "extortion [of employers] by employee representatives," and "abuse by union officers of the power which they might achieve if welfare funds were left to their sole control." *Arroyo* v. *United States*, 359 U.S. 419, 425-426 (1959). The statute reacted to a demand by the president of the United Mine Workers that "a tax of 10 cents a ton on coal be paid" to the union "for an indiscriminate use for so-called welfare purposes." S. Rep. No. 105, 80th Cong., 1st Sess. 52 (1947) (Senate Report); see, *e.g.*, *United States* v. *Ryan*, 350 U.S. 299, 304-305 (1956).

Members of Congress believed that "if any such huge sums were to be paid" to the union, their use must be "strictly safeguarded" so that the funds would be used

for the benefit of employees rather than union officials. Senate Report 52. Particularly because these funds would be paid by the employer "in consideration of the services of the employees," legislators wanted assurance that employees, and not union officials, would benefit from them. *Ibid.* Unless Congress "define[d] with specificity the benefits payable" to such welfare funds, a "substantial danger existed that such funds might be employed to perpetuate control of union officers, for political purposes, or even for personal gain." *Arroyo*, 359 U.S. at 426; see, *e.g.*, 92 Cong. Rec. 5344, 5345 (1946) (statement of Sen. Ball) (legislation necessary to ensure "that the funds so paid over will actually be used for the purpose for which they are supposed to be used," not used by union officials to "perpetuate themselves in power").

More generally, the congressional debate reflects concern that if union officials could demand that employers pay royalties on production, they might "take[] advantage of the positions which they occupy * * * to fill their own pockets." 92 Cong. Rec. 5180, 5181 (1946) (statement of Sen. Overton); see, *e.g.*, 92 Cong. Rec. 4900 (1946) (statement of Sen. Byrd) (provision's purpose is "to prevent the payment of a royalty to the representatives of a union"); 93 Cong. Rec. 4746 (1947) (statement of Sen. Taft) (provision was intended to address "extortion or a case where the union representative is shaking down the employer").

Congress therefore barred employers from making payments to unions and union officials, and unions and union officials from demanding such payments, except under certain circumstances. See § 302, 61 Stat. 157. Section 302 was intended to "prevent employers from tampering with the loyalty of union officials and to pre-

vent union officials from extorting tribute from employers." *Turner* v. *Local Union No. 302, Int'l Bhd. of Teamsters*, 604 F.2d 1219, 1227 (9th Cir. 1979).

2. Nothing in the legislative record suggests that Congress intended to criminalize compliance with voluntary recognition agreements. To the contrary, at the same time Congress enacted Section 302, it enacted several other provisions that acknowledged the validity of labor agreements that provided benefits to unions.

For example, Congress provided that an employer and union may "mak[e] an agreement" that requires employees to become union members "as a condition of employment." § 101, 61 Stat. 140-141 (enacting 29 U.S.C. 158(a)(3) and (b)). Congress thereby permitted union security agreements, under which the payment of union membership dues is a condition of employment, see *Radio Officers Union* v. *NLRB*, 347 U.S. 17, 39-42 (1954), and agreements making union-run hiring-halls the exclusive source of hiring referrals, see *Local 357, Int'l Bhd. of Teamsters* v. *NLRB*, 365 U.S. 667, 672-676 (1961). Congress underscored its commitment to voluntary resolution of disputes by authorizing the federal courts to enforce "contracts between an employer and a labor organization." § 301(a), 61 Stat. 156-157 (enacting 29 U.S.C. 185). It is difficult to believe that, at the same time Congress permitted agreements that provided valuable benefits to unions and provided that these agreements would be enforceable in federal court, it intended to criminalize voluntary recognition agreements setting procedures for an organizing campaign.

The amended statute continued to require that an employer bargain collectively with "the representatives of his employees," without specifying how the repre-

sentatives must be chosen. § 101, 61 Stat. 141 (enacting 29 U.S.C. 158(a)(5)). This provision presumes that "[a] union is not limited to a Board election" to gain recognition as the employees' bargaining representative. *Gissel Packing Co.*, 395 U.S. at 597 (quoting 29 U.S.C. 159(a)(5)). Similarly, the amended statute refers to "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees," again without specifying the means of recognition. § 101, 61 Stat. 143 (enacting 29 U.S.C. 159(a)). Congress also included language permitting employees whose "employer declined to recognize their representative" to seek recognition through an NLRB election, § 101, 61 Stat. 144 (enacting 29 U.S.C. 159(c)(1)(A)(i)). That provision's reference to an employer's refusal to recognize the employees' representative presupposes that an employer may recognize a union voluntarily. *Lamons Gasket Co.*, 2011 WL 3916075, at *4. And Congress considered, but rejected, an amendment that would have made the employer's duty to bargain enforceable only where the union had demonstrated its majority status through a secret-ballot election. See *Gissel Packing*, 395 U.S. at 598 (citing H.R. 3020, 80th Cong., 1st Sess. § 8(a)(5) (1947), and H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 41 (1947)); *Lamons Gasket Co.*, 2011 WL 3916075, at *5.

Further, in 1947 Congress enacted 29 U.S.C. 158(e) to "insure both to employers and labor organizations full freedom to express their views to employees on labor matters." Senate Report 23-24; see § 101, 61 Stat. 142. And members of Congress acknowledged, without disturbing, the settled understanding that an employer can permit forms of union access to employer property beyond what the NLRA requires. At the time of the 1947

amendments, the NLRA provided that it was an unfair labor practice for an employer to "dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it," but also stated that an employer was not prohibited from "permitting employees to confer with him during working hours without loss of time or pay." 29 U.S.C. 158(2) (1940). While considering possible amendments to that provision, the House Report accepted as a commonplace truth that an employer can do "more for the union of his employees than the act, by its terms, permits" such as "provid[ing] * * * bulletin boards for the union's use" and "allow[ing] representatives of the union" to "confer not only with the employer but as well with employees" on company property. H.R. Rep. No. 245, 80th Cong., 1st Sess. 28-29 (1947); see *BASF Wyandotte Corp.* v. *Local 227, Int'l Chem. Workers Union*, 791 F.2d 1046, 1051-1052 (2d Cir. 1986). The Congress that expressly recognized employer free speech and took for granted that employers may allow union access to employees and property would not have silently outlawed voluntary employer-union agreements encompassing the very same elements.

3. The 1959 amendments to Section 302 likewise evidence no congressional intent to criminalize voluntary recognition agreements. As originally enacted, Section 302 provided that an employer could not pay or deliver any money or thing of value "to any representative of any of his employees who are employed in an industry affecting commerce." 61 Stat. 157. That language was interpreted to apply only to payments made to incumbent unions and union representatives and not to unions seeking to become the collective bargaining representa-

tive of employees. See *Ventimiglia* v. *United States*, 242 F.2d 620, 623-624 (4th Cir. 1957).

To close this gap, Congress extended Section 302's reach to "any labor organization, or any officer or employee thereof, which represents, *seeks to represent*, or would admit to membership, any of the employees of the employer." Pub. L. No. 86-257, § 505, 73 Stat. 537 (emphasis added); see S. Rep. No. 187, 86th Cong., 1st Sess. 13 (1959). Although Congress expressly extended Section 302 so that it would apply during the organizing process, no one suggested that the statute would criminalize voluntary ground-rules agreements for organizing. To the contrary, the one Member of Congress who mentioned such agreements found it obvious that Section 302 would not prohibit card-check agreements and other similar agreements that are part of "normal and legitimate labor relations." 104 Cong. Rec. 16,464 (1958) (statement of Rep. McGovern). Rather, he reaffirmed that the statute "prohibits improper payments to union officials, employees or middlemen—in a word, it forbids bribes or pay-offs." *Ibid.*

D. Interpreting Section 302 To Prohibit Voluntary Recognition Agreements Would Destabilize Labor-Management Relations

In the decades since Section 302's enactment, employers and unions have understood that they may reach agreement about procedures for organizing campaigns and for voluntary recognition, and the NLRB and the courts have routinely enforced those agreements. The court of appeals' view would upset that settled understanding and undermine Congress's goal of promoting industrial peace through voluntary employer-union agreements.

1. As this Court has recognized, the NLRA "expresses a federal policy" that "industrial peace can be best obtained" when employers and unions voluntarily reach agreement and "the federal courts * * * enforce these agreements." *Textile Workers Union of Am.* v. *Lincoln Mills*, 353 U.S. 448, 455 (1957). From its earliest days, the NLRB has permitted resort to so-called "consent" arrangements, rather than formal NLRB elections, to resolve recognition disputes. NLRB, *Ninth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1944*, at 8, 11 (1944); see also Harry A. Millis and Emily Clark Brown, *From the Wagner Act to Taft-Hartley, A Study of National Labor Policy and Labor Relations* 87 (1950) (over a 12-year period "nearly half [of the representation petitions] were reported as adjusted without formal action").

Since the NLRA's beginning, employers have agreed to allow unions access to their property, including bulletin boards and the employer's facilities, and to provide lists of employees. See *Collective Bargaining Contracts: Techniques of Negotiation and Administration with Topical Classification of Clauses* 149, 586 (BNA 1941); *Union Contract and Collective Bargaining*, 4 Labor Equipment (PH) ¶¶ 53,280 (Mar. 15, 1948), 56,754.6 (Apr. 26, 1948). By 1941, this Court had clarified that employers had the right to speak for or against unionization so long as their speech was not unduly coercive. See *Virginia Elec. & Power Co.*, 314 U.S. at 477. Some employers chose to exercise their speech rights by agreeing "not to engage in antagonistic propaganda." *Union Contracts and Collective Bargaining* ¶ 53,352 (Apr. 15, 1946).

Voluntary recognition has continued to play an important role in labor-management relations since the

enactment of Section 302. Since 1947, it has become common for unions to organize outside "the election procedure of the NLRB" and to "conduct an organizational drive, sign up enough members to demand a contract, and persuade the employer either voluntarily or after a strike to begin collective bargaining." Irving Bernstein, *The Growth of American Unions, 1945-1960, reprinted in Selected Works of Irving Bernstein* 73, 91 (eds. George H. Hildebrand, Frederick Meyers 1977); see Adrienne E. Eaton & Jill Kriesky, *NLRB Elections Versus Card Check Campaigns: Results of a Worker Survey*, 62 Indus. & Lab. Rel. Rev. 157 (2009). The NLRB has a "long-established" policy of "promot[ing] voluntary recognition and bargaining between employers and labor organizations, as a means of promoting harmony and stability of labor-management relations." *MGM Grand Hotel, Inc.*, 329 N.L.R.B. at 466. And courts have observed that voluntary recognition agreements can benefit both employers and unions by providing a path for peaceful resolution of "those tensions inevitably flowing from a union organizing effort." *Hotel & Rest. Emps. Union Local 217* v. *J.P. Morgan Hotel*, 996 F.2d 561, 566 (2d Cir. 1993).

Formal ground-rules agreements to govern the voluntary-recognition process, with neutrality and access provisions like those at issue here, first appeared in the 1970s. See James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 Iowa L. Rev. 819, 825 (2005); William J. Guzick, *Employer Neutrality Agreements: Union Organizing Under a Nonadversarial Model of Labor Relations*, 6 Indus. Rel. L.J. 421, 434-437 (1984). Although the terms in these agreements vary, typical terms have included the employer's agreement to re-

frain from expressing its views about union representation, to provide the union with access to the employer's facilities and with a list of names and addresses of employees, and to recognize the union as a result of a card-check procedure, and the union's agreement to refrain from disparaging the employer and from engaging in picketing and economic action. See Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 Indus. & Lab. Rel. Rev. 42, 46-48 (2001); see also, *e.g.*, *Hotel Emps., Rest. Emps. Union, Local 2* v. *Marriott Corp.*, 961 F.2d 1464, 1467-1468, 1470 (9th Cir. 1992).

The NLRB has routinely upheld voluntary recognition and ground-rules agreements under the NLRA. See, *e.g.*, *Verizon Info. Sys.*, 335 N.L.R.B. 558, 558-560 & n.7 (2001) (because union invoked ground-rules agreement to obtain employee lists and access, it was barred under the agreement from filing representation petition); *MGM Grand Hotel, Inc.*, 329 N.L.R.B. at 466 (enforcing voluntary recognition); *Cam Indus., Inc.*, 251 N.L.R.B. 11, 11-12 (1980) (enforcing card-check agreement), enforced 666 F.2d 411, 412-413 (9th Cir. 1982); *Snow & Sons*, 134 N.L.R.B. 709 (1961) (same), enforced 308 F.2d 687, 689-690, 695 (9th Cir. 1962). The NLRB also has found an unfair labor practice when an employer refuses to bargain collectively with a union it had agreed to recognize voluntarily. See, *e.g.*, *Creative Food Design Ltd.*, 852 F.2d at 1297-1298; *Cayuga Crushed Stone, Inc.*, 195 N.L.R.B. 543, 544, 546 (1972), enforced 474 F.2d 1380, 1384 (2d Cir. 1973).

Voluntary recognition agreements, like other employer-union agreements, have long been enforceable in federal court under 29 U.S.C. 185. See, *e.g.*, *J.P. Morgan Hotel*, 996 F.2d at 563, 566-568; *Marriott Corp.*, 961

F.2d at 1467-1470; *Amalgamated Clothing & Textile Workers Union* v. *Facetglas, Inc.*, 845 F.2d 1250, 1252-1253 (4th Cir. 1988). The NLRB and the courts also have recognized that employers may allow a union access to their premises and provide employee lists, so long as they provided the same opportunities to rival unions. See, *e.g.*, *Waterman S.S. Corp.*, 309 U.S. at 209-210 & n.4, 225-226 (access); *Kimbrell* v. *NLRB*, 290 F.2d 799, 802 (4th Cir. 1961) (access); *NLRB* v. *L. Romney & Sons Furniture Mfg. Co.*, 206 F.2d 730, 735 (9th Cir. 1953) (list of employee names and addresses), cert. denied, 346 U.S. 937 (1954).

2. Section 302 must be read against this backdrop. Mulhall's contention that an employer would commit a federal crime by complying with the terms of a voluntary recognition agreement cannot be reconciled with the longstanding and settled body of law allowing such agreements, including the particular provisions challenged here. Such an agreement implicates none of the concerns animating Section 302. These voluntary agreements "do not involve bribery or other corrupt practices" and do not provide "personal[] benefit[s]" to union officials; instead, they "eliminate the potential for hostile organizing campaigns in the workplace." *Adcock*, 550 F.3d at 375. Reading the statute to criminalize voluntary recognition agreements would penalize the "friendly adjustment of industrial disputes," despite Congress's longstanding policy of encouraging such cooperation as a way of avoiding industrial strife. 29 U.S.C. 151.

Moreover, the court of appeals' theory may cast doubt on other voluntary agreements outside of the union-recognition context that also play a key role in effectuating the purposes of the NLRA, including some

terms common in collective-bargaining agreements such as plant access or access to an employer bulletin board or e-mail system. Compare, *e.g.*, *Wolgast Corp.* v. *NLRB*, 349 F.3d 250, 256 (6th Cir. 2003) (bargained-for access provisions implement "the employees' own undisputed § 7 right to negotiate and benefit from a collective bargaining agreement which allows union access for purposes of investigating the premises and interviewing employees on-site"), enforcing 334 N.L.R.B. 203 (2001), cert. denied, 541 U.S. 936 (2004), with Pet. App. 7-8 (Section 302 implicated where "benefits extended * * * can be considered valuable" and providing the benefits "fulfills an obligation").

Collective bargaining is the cornerstone of the NLRA. A theory of Section 302 that could sweep in all employer agreements to provide a union with things it "desires," believes "valuable," and finds "objectively useful," Pet. App. 68-70, as Mulhall alleged, would subvert the statute's core provisions. Rather than upset the careful balance Congress struck in the labor context between "protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes," *Chamber of Commerce*, 554 U.S. at 65 (citation omitted), this Court should reject the court of appeals' unprecedented and unwarranted interpretation of Section 302.

3. The court of appeals attempted to limit the reach of its holding that an employer's compliance with a voluntary recognition agreement may violate Section 302 by requiring a showing of improper intent. Pet. App. 8-9. In the court's view, "innocuous ground rules can become illegal payments if used as valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer," and so the court remanded for an

inquiry into "why Unite and Mardi Gras agreed to cooperate." *Ibid.*[6]

An approach that makes the validity of an organizing ground-rules agreement under Section 302 depend on the parties' intent is unsound. Section 302 does not require a specific intent to corrupt a union or to extort a benefit from an employer. See 29 U.S.C. 186(a)(2) and (b)(1). By contrast, intent to exert improper influence is required under a different part of the statute. See 29 U.S.C. 186(a)(4). When Congress desires to make the legality of giving a thing of value contingent on an intent to influence the recipient, it knows how to do so.

To the extent that a voluntary recognition agreement may have an unlawful purpose or effect, the proper remedy is an unfair labor practice proceeding before the NLRB, not a lawsuit under Section 302. See *Adcock*, 550 F.3d at 376. The availability of such remedies under the NLRA provides a compelling reason not to stretch Section 302 to reach the conduct here. *Id.* at 377; cf. *Credit Suisse*, 551 U.S. at 279 (recognizing the SEC's drawing of "fine, complex, detailed line[s]" between lawful and unlawful securities-related conduct as a reason to find antitrust attack foreclosed). And Mulhall's position would go farther, substituting a per se ban on agreements to allow union access to property or employee information, in direct conflict with the Board's holding that "[t]he use of company time and property does not per se support a finding of [improper] support and assistance." *Manuela Mfg. Co.*, 143 N.L.R.B. 379, 385 (1963). Mulhall's and the court of appeals' positions—which allow criminal penalties and private actions to police standard card-check, access, and neutrality

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[6] Notably, the district court found "no indication of corruption or bribery of Unite Here officials" in this case. Pet. App. 18-19.

agreements—would intrude on the role of the NLRB and "wreak havoc on the carefully balanced structure of the laws governing recognition of and bargaining with unions." *Sage*, 390 F.3d at 219.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

M. PATRICIA SMITH
Solicitor of Labor
CHRISTOPHER B. WILKINSON
Associate Solicitor
JEFFREY M. LUPARDO
Senior Attorney
Department of Labor

LAFE E. SOLOMON
Acting General Counsel
National Labor Relations Board

DONALD B. VERRILLI, JR.
Solicitor General
MYTHILI RAMAN
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
NICOLE A. SAHARSKY
Assistant to the Solicitor General
JOHN M. PELLETTIERI
Attorney

AUGUST 2013

APPENDIX

1. 29 U.S.C. 151 provides:

Findings and declaration of policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment to industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to the be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of associations, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

2. 29 U.S.C. 157 provides:

Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

3. 29 U.S.C. 185 provides:

Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this

chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

4. 29 U.S.C. 186 provides:

Restrictions on financial transactions

(a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of

employees or as such officer or employee of such labor organization.

(b) Request, demand, etc., for money or other thing of value

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in section 13102 of title 49) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided*, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) Exceptions

The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees,

or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any

of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided*, That the re-

quirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, (B) child care centers for preschool and school age dependents of employees, or (C) financial assistance for employee housing: *Provided*, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: *Provided further*, That no such legal services shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal

services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. 401 et seq.]; or (9) with respect to money or other things of value paid by an employer to a plant, area or industrywide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978.

(d) Penalties for violations

(1) Any person who participates in a transaction involving a payment, loan, or delivery of money or other thing of value to a labor organization in payment of membership dues or to a joint labor-management trust fund as defined by clause (B) of the proviso to clause (5) of subsection (c) of this section or to a plant, area, or industry-wide labor-management committee that is received and used by such labor organization, trust fund, or committee, which transaction does not satisfy all the applicable requirements of subsections (c)(4) through (c)(9) of this section, and willfully and with intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment, loan, money, or other thing of value under subsections (c)(4) through (c)(9) violates this subsection, shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than $10,000, or imprisoned for not more than one year, or both.

(2) Except for violations involving transactions covered by subsection (d)(1) of this section, any person who willfully violates this section shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than $10,000, or imprisoned for not more than one year, or both.

(e) Jurisdiction of courts

The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of title 15 and section 52 of this title, and the provisions of chapter 6 of this title.

(f) Effective date of provisions

This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Contributions to trust funds

Compliance with the restrictions contained in subsection (c)(5)(B) of this section upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) of this section be construed as

prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-99

IN THE

Supreme Court of the United States

UNITE HERE LOCAL 355,
Petitioner,
v.
MARTIN MULHALL AND HOLLYWOOD GREYHOUND TRACK, INC. D/B/A MARDI GRAS GAMING,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, SERVICE EMPLOYEES INTERNATIONAL UNION AND NATIONAL EDUCATION ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

CRAIG BECKER
LYNN RHINEHART
JAMES B. COPPESS
American Federation of Labor and Congress of Industrial Organizations
815 16th Street, N.W.
Washington, D.C. 20005
Telephone: (202) 637-5310

LEON DAYAN
Counsel of Record
LAURENCE GOLD
Bredhoff & Kaiser, P.L.L.C.
805 15th Street, N.W.,
Suite 1000
Washington, D.C. 20005
Telephone: (202) 842-2600
ldayan@bredhoff.com

[ADDITIONAL COUNSEL ON INSIDE COVER]

Peake DeLancey Printers, LLC - (301) 341-4600 - Cheverly MD

JUDITH A. SCOTT
WALTER KAMIAT
MARK SCHNEIDER
Service Employees
International Union
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
Telephone: (202) 730-7455

ALICE O'BRIEN
PHILIP A. HOSTAK
National Education
Association
1201 16th Street, N.W.
Washington, D.C. 20036
Telephone: (202) 822-7035

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29 U.S.C. § 158(c)	24
29 U.S.C. § 158(e)	19
29 U.S.C. § 159(c)	14
29 U.S.C. § 186	2
29 U.S.C. § 186(a)	25
29 U.S.C. § 186(a)(2)	6
29 U.S.C. § 186(a)(3)	35
29 U.S.C. § 186(a)(4)	35
29 U.S.C. § 186(b)(1)	6
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LEGISLATIVE MATERIAL	
S. Rep. 80-105 (1947)	11
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105 Cong. Rec. 6670-71 (1959)	20
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INTEREST OF AMICI CURIAE

This brief *amicus curiae* is submitted, with the parties' consent,[1] by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), Service Employees International Union (SEIU), and National Education Association (NEA). The AFL-CIO is a federation of 57 labor organizations representing over 12 million workers. SEIU is an international labor organization representing over 2 million workers. NEA is a national labor organization representing 3 million public- and private-school employees. *Amici* and/or their affiliates often negotiate labor-management agreements similar to those challenged in this case that include mutually beneficial ground rules for the conduct of organizing campaigns.

STATEMENT

The complaint (Complaint) brought by Respondent Mulhall (Respondent) seeks to enjoin the enforcement of a recognition-process agreement between Mardi Gras (Employer) and Petitioner Unite Here Local 355 (Union). The Agreement is typical of recognition-process agreements commonly entered into by management and labor to resolve labor disputes. In exchange for the Union's promise to waive certain rights, including its right under Section 8(b)(7) of the Labor Management Relations Act

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[1] Letters of consent from Respondents are on file with the Clerk. *Amici* received written consent from Petitioner. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to fund its preparation or submission.

(LMRA), 29 U.S.C. § 158(b)(7), to engage in organizational picketing of the Employer's premises, Pet. App. 82, the Employer made a number of promises to the Union.

The Agreement's central clause states that if the Union can demonstrate to a neutral arbitrator that it has the support of a majority of the employees in a particular bargaining unit, as evidenced by signed authorization cards, the Employer will voluntarily recognize the Union as the exclusive representative and commence collective bargaining. Pet. App. 81-82. The Agreement also contains subsidiary clauses setting out certain ground rules, all subject to arbitral oversight, governing the parties' conduct during the Union's organizing effort. The Employer agrees: to remain neutral on union representation, Pet. App. 79; to accord the Union limited access to the non-public non-work areas of the Employer's premises so that it can communicate with the employees about union representation during their non-work time, *id.* 80; and to provide the Union with a list of employee names and home addresses for the same purpose, *id.* 81.

Respondent's Complaint does *not* challenge the voluntary recognition clause. It challenges only the subsidiary clauses just described, claiming they are "facially invalid under § 302 of the LMRA," 29 U.S.C. § 186, a criminal provision of federal labor law. Pet. App. 75.

The Eleventh Circuit rejected the theory that the clauses are facially invalid. Pet. App. 8. But, despite the absence of allegations in the Complaint pleading improper intent, the court of appeals held that the lawfulness of the clauses depended on the parties'

intent in agreeing to them, reversed the district court's grant of Petitioner's motion to dismiss, and remanded for further proceedings to "determine the reason why Unite and Mardi Gras agreed to cooperate with one another." *Id.* 9.

SUMMARY OF ARGUMENT

Sections 302(a)-(b) of the LMRA make it a crime for an employer to "pay, lend, or deliver any money or other thing of value" to a labor organization; for a labor organization to "request" such a "payment, loan, or delivery," or for the parties to "agree" to such a payment, loan, or delivery. The theory of Respondent's Complaint is that § 302 criminalizes any request by a union for any employer action on a labor-relations matter that yields something "subjectively desir[able]" or "objectively useful" to the union in advancing a union institutional interest. That theory is foreclosed both by the text and statutory context of the provision, which compel a narrower construction.

As to text, § 302's phrase "pay, lend, or deliver" requires a *transfer* by the employer to the union of money or some other employer asset; and its conjoined phrase "any money or other thing of value" requires that the transferred asset must, like money, be of *general commercial value in the market* and not, unlike money, be of value only to the recipient. Those two textual limits are confirmed by § 302's history, which shows that the evil at which § 302 was aimed was the diversion to a union of employer money and assets that otherwise could be made available to pay employee wages.

As to context, whereas Respondent's construction of § 302 would put it at war both with specific provisions of the LMRA and the LMRA's overall structure, the proper construction demanded by § 302's text harmonizes § 302 with the LMRA as a whole.

Applying the proper construction to the three challenged clauses of the Agreement here establishes that the Agreement is lawful. The first challenged clause sets out a ground rule that the Employer will take a neutral position on union representation. An employer's decision not to campaign against a union is not something that is "pa[id], len[t], or deliver[ed]" to anyone; thus the *transfer* element is unsatisfied. Additionally, an employer's decision not to campaign against a union is not an asset of general commercial value; thus the *money-or-other-thing-of-value* element is likewise unsatisfied.

Although Respondent concedes that an employer exercising its free-speech right to remain neutral on unionization does not violate § 302, he contends that where an employer enters into an *agreement* to be neutral, it delivers a "thing of value" to the union in the form of "control" over the employer's free-speech rights. That argument fails. Section 302's text makes plain that § 302 prohibits only those agreements that require the employer to "pay, lend, or deliver" something that could not lawfully be paid, lent, or delivered in the absence of an agreement.

The second challenged clause sets a ground rule that allows the Union limited access to the Employer's premises to reach employees in its organizing effort.

This, too, is not effectuating the transfer of any asset to the Union, let alone one of general commercial value; the Employer is merely exercising its own right to determine whom to invite on and whom to exclude from its property. Moreover, construing § 302 to criminalize the provision-of-access clause would put § 302 in conflict with decades of established law *requiring* employers to provide access to union representatives under numerous circumstances and always *permitting* an employer to do so.

The third clause provides that the Employer will share employee contact information with the Union for purposes of communicating with employees in its organizing effort. Here, too, what is being provided has no commercial value in the market, but has value only to the Union. Indeed, the list is similar in kind to the information that the National Labor Relations Board (NLRB), with approval from this Court, long has required employers to make available in the course of election campaigns conducted under the Board's supervision.

While properly rejecting Respondent's position, the Eleventh Circuit nevertheless erred by improperly inserting an intent requirement in § 302(a)(2) that Congress deliberately omitted.

ARGUMENT

I. RESPONDENT'S CONSTRUCTION OF LMRA § 302 IS UNSOUND

Section 302(a)(2) of the LMRA makes it a criminal offense for an employer to "pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other

thing of value" to a labor organization which represents or seeks to represent the employer's employees, 29 U.S.C. § 186(a)(2); and § 302(b)(1), in turn, makes it a criminal offense for any such labor organization "to request, demand, receive or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value" from an employer. 29 U.S.C. § 186(b)(1).

Respondent's Complaint alleges that the Union committed a criminal offense under § 302(b)(1) by making a "request" that the Employer agree to take a neutral position on union representation during the Union's organizing effort; committed a second offense by making a "request" that the Employer permit Union representatives to enter the non-public, non-work areas of the Employer's premises to communicate with the employees during that organizing effort; and committed a third offense by making a "request" that the Employer agree to share with the Union a list of employee names and addresses for that same purpose. Pet. App. 73-74.

Respondent's legal theory, as expressed in the Complaint, is this: The phrase "thing of value" means something that the recipient of the thing "subjectively desires" or considers "objectively useful," so it necessarily follows that §§ 302(a)(2) & (b)(1) are properly read to proscribe (i) any employer action on a labor-relations matter that yields something that is "subjectively desir[able]" or "objectively useful" to the union in pursuing a union institutional interest; and (ii) any union request that the employer take such an action. Pet. App. 68, 69, 70.

The most that might be said for Respondent's legal theory is that its premise—that the phrase "thing of value" means anything that is "subjectively desir[able]" or "objectively useful"—rests on *one* of the plausible understandings of that phrase if the phrase is read *in isolation*. But there is nothing to Respondent's hypothesis that the phrase "thing of value" has that meaning *in § 302*, where the phrase does *not* stand alone but is one component of a broader statutory provision, and where that provision is one component of a broader statute, the LMRA, that is founded on the recognition that unions and employers frequently and properly make requests of one another and enter into agreements with one another over a myriad of labor-relations matters—and thereby exchange "subjectively desirable" and "objectively useful" accommodations and concessions to one another—instead of resorting to industrial combat to settle their differences.

As we proceed to show, the text of §§ 302(a)(2) & (b)(1)—when read as statutory text must be, "by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole," *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)—forecloses Respondent's construction of § 302. And, as we further show, those provisions, properly read, make criminal only those transactions in which (i) the employer transfers to the union, or agrees to transfer to the union, money or some other transferable employer asset; and (ii) the asset transferred to the union is money or something that, like money, is of general commercial value

in the market (and *not* something that, unlike money, is only of value, or potential value, to the recipient).

A. Respondent's Construction of § 302 Cannot Be Squared with the Language of § 302

The words of § 302's operative phrases—that it is a criminal wrong for an employer "to pay, lend, or deliver any money or other thing of value" to a union and for a union to "receive or accept" any such employer payment, loan, or delivery—read together and in context serve to establish two critical limits on the provision's scope.

1. Section 302's text makes it plain that the provision does *not* apply to any and all employer-union interactions but rather to one particular set of employer-union transactions: those in which the employer makes a transfer to a union of an asset in its possession in a manner that results in the union obtaining possession of the asset.

What § 302 says is that it is unlawful for an employer to "pay, lend or deliver" to a union "any money or other thing of value" and for a union to "receive" or "accept" that employer "payment, loan or delivery." And the natural reading of the active verbs "pay, lend, or deliver" and their correlatives "receive or accept" in this context is that the first person—the payer/lender/deliverer—is turning over an asset he or she possesses to the second person, who "receives" or "accepts" that asset and takes possession of it. *Cf. Sekhar v. United States*, 133 S. Ct. 2720, 2725 (2013) (holding that the term "property" as used in the Hobbs Act's prohibition against the "obtaining of property from another," must refer to property that is

"transferable" or "capable of passing from one person to another," and not more elusive forms of property (emphasis omitted)).

Thus, § 302's "payment, loan, or delivery" element directly contradicts Respondent's claim that the provision reaches any and all employer actions that yield something that is "subjectively desirable" or "objectively useful" to a union without regard to whether the employer action that yields that benefit to the union is part of an employer-union transaction involving a transfer by the employer to the union of some employer asset.

2. Of equal moment, § 302's operative phrases, reading all their words together and in context, place a *second* rational, discernible limit on the class of employer-union transactions that § 302 criminalizes. Section 302 does so by providing that it is a crime for an employer "to pay, lend, or deliver *any money or other thing of value*" to a union.

In context, or standing alone, the term "money" is clear and self-explanatory. And whatever may be true when the phrase "thing of value" stands alone, when it is instead one integral part of a phrase that conjoins the words "pay, lend, or deliver" and "money or other thing of value," the fair reading of "other thing of value" is an employer asset that is closely akin to money in that it has commercial value in the market. For only an asset that has commercial value in the market is, like money, valuable in the employer's hands and would be equally valuable in the union's hands or a third person's hands. Such an employer asset is thus sufficiently like money that a simple pro-

hibition on an employer "payment, loan, or delivery of any *money*" to a union would be seriously incomplete unless the prohibition were expanded to the "payment, loan, or delivery of any money or other thing of value."

That understanding of "money or other thing of value" has two strong buttresses in § 302's text and history.

First, in § 302(c), Congress drafted the express exceptions to the prohibitions in §§ 302(a)-(b) in language that indicates that what Congress meant by "any money or other thing of value" was any money or other employer asset that has commercial value in the market. In § 302(c)(5), for example, Congress specified that § 302's general prohibition "shall not be applicable" "with respect to money or other thing of value paid to a [union-sponsored] trust fund ... *Provided*, That (A) such payments are held in trust *for the purpose of paying, either from principal or income, or both*, for the benefit of employees ... medical or hospital care [and other employee benefits]." 29 U.S.C. § 186(c)(5) (emphasis added). *Not* everything that is "subjectively desirable" or "objectively useful" to a union can be used or monetized to pay, "from principal or income, or both," employee benefits; in contrast, employer assets with commercial value in the market *can* be so used.

Second, the co-sponsors of § 302, including Senator Taft, the chief floor manager of the Senate bill that contained § 302 and became law, authoritatively stated the theory of the provision in the following terms:

The amendment proceeds on the theory that union

> leaders should not be permitted, without reference to the employees, to divert funds paid by the company, in consideration of the services of employees, to the union treasury or the union officers....
>
> The necessity for the amendment was made clear by the demand made last year on the part of the United Mine Workers that a tax of 10 cents a ton on coal to be paid to the Mine Workers Union for indiscriminate use for so-called welfare purposes. It seemed essential to the Senate at that time, and today, that if any such huge sums were to be paid, representing as they do the value of the services of the union members, which could otherwise be paid to the union members in wages, the use of such funds be strictly safeguarded.

S. Rep. No. 80-105, pt. 1, at 52 (1947).

The evil at which the provision was aimed was thus the diversion to the union of employer money, and of employer assets that could be monetized, that the employer had available for making wage payments to its employees. And the nature of that evil confirms the reading of § 302 that we have advanced, namely, that the proscription against "payment[s]" and "deliver[ies]" of "any money or other thing of value" reaches, in addition to money, payments and deliveries of employer assets that are capable of being used to finance employee wages and benefits but are also capable of being diverted to a union seeking to augment its own treasury.

B. Respondent's Construction of § 302 Would Put § 302 in Conflict with Other Provisions of the LMRA

An examination of the LMRA's text as a whole con-

firms that LMRA § 302 does *not* criminalize employer actions with respect to a labor-relations matter that yield something subjectively desirable or objectively useful to a union in pursuing a union institutional interest, such as the union interest in organizing unorganized employees or in representing organized employees. That theory of § 302's reach not only stretches § 302's words well beyond the breaking point but as we now show would put § 302 at war with other provisions of the LMRA and violate both the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," and the related principle that the "task is to fit, if possible, all parts into an harmonious whole." *Roberts v. Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1356-57 (2012) (quotation omitted).

To illustrate the extent of this conflict, we examine in depth the LMRA's treatment of two employer actions with respect to labor-relations matters that are *more* "desirable" and *more* "useful" to unions engaged in organizing unorganized employees than the three clauses of the Agreement Respondent challenges here.

The first is the employer action, in response to a union request, of voluntarily recognizing the union. Voluntary recognition means that the employer waives its right to insist that the union demonstrate majority employee support through an NLRB-conducted secret-ballot election; and the employer instead confers recognition based on majority employee support demonstrated through a neutral's verification of authorization cards, an arbitrator-conducted election, or other similar forms of proof. *See generally Linden Lumber v. NLRB*, 419 U.S. 301, 309-10 (1974).

The second is the employer action, at the union's request, of refusing to do business with nonunion firms under a secondary boycott.

Voluntary recognition is subjectively desirable and objectively useful to a union pursuing its institutional interest in organizing unorganized employees in many ways. It permits the union, upon obtaining majority support through, *e.g.*, authorization cards, to commence collective bargaining without delay; without the need to prove its majority status through the lengthy, complex, and expensive NLRB representation-case election process; and without the need to counter any new or redoubled employer efforts to dissuade employees from voting for union representation.

Employer refusals to do business with nonunion firms are likewise desirable or useful to a union engaged in an organizing effort, since firms that are losing business because their employees are not represented by the union have a strong incentive not to oppose the union's organizing efforts; indeed, they have a strong incentive to exercise their free-speech right to counsel their employees to *support* union representation. This Court took note of that incentive in *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 663 (1982), when it observed that "secondary subcontracting agreements ... create top-down organizing pressure."

We focus on these two types of employer actions (i) because they both promote the precise union institutional interest in organizing unorganized employees that, according to Respondent, rendered the

Union's negotiation of the three clauses in the Agreement challenged here a form of union "self-dealing," Resp.'s Mem. in Support of Pet. at 13-14; and (ii) because the Congresses that adopted § 302 in 1947 as part of the Taft-Hartley Act and amended § 302 in 1959 also enacted LMRA provisions concerning both the issue of voluntary recognition and the issue of boycotts of nonunion firms; and those provisions are incompatible with the theory articulated in Respondent's Complaint as to the reach of § 302's criminal-law prohibition.

1.a. As to voluntary recognition, it is clear from the text of the LMRA that the 1947 Congress that enacted § 302 did *not* prohibit either an employer grant of voluntary recognition or a union request for such recognition.

Section 9(c) of the LMRA, 29 U.S.C. § 159(c), was part of the same bill that included § 302. Section 9(c) addresses the subject of recognition and elections and does so by stating that one type of election petition by a union that triggers an NLRB-conducted election is a petition "alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer *declines to recognize their representative*..." 29 U.S.C. § 159(c) (emphasis added). That language makes clear that a request for recognition tendered by a union and declined by an employer is a request that the employer *lawfully can accept.* Congress would not, of course, have included a request-for-voluntary-recognition step in this statutorily authorized path to an election if that step would be pointless. Lest there be any doubt on the matter, this Court held unequivocal-

ly in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 597-98 (1969), that the 1947 Congress made a deliberate choice to allow voluntary recognition where the union has majority support based on authorization cards and has not had its majority confirmed in an NLRB-conducted election.

Yet on the theory of the Complaint—under which a § 302 "thing of value" is delivered any time an employer action yields a benefit to a union that is "objectively useful" to the union in organizing unorganized employees, such as recognition without a Board election—§ 9(c) *would* contemplate unions' taking the pointless step of making a request for recognition that § 302 would require the employer to decline. Far from "fit[ting], if possible, all parts [of the LMRA] into an harmonious whole," *Roberts*, *supra*, the theory as to § 302's reach set out in the Complaint would put § 9(c) and § 302 into open conflict and render the LMRA discordant.

b. The Complaint's theory as to § 302's reach would create an equally sharp conflict with respect to the 1959 amendments to the LMRA, which were part of the Labor-Management Reporting and Disclosure Act (LMRDA). The 1959 Congress had before it both the question whether § 302 should be amended and the question whether the LMRA's voluntary-recognition regime should be amended; and that Congress, like the 1947 Congress, acted in a manner that belies the Complaint's theory as to § 302's reach.

The 1959 Congress, in addressing § 302, made two amendments to the original Taft-Hartley version that

are significant for present purposes. First, whereas the original § 302 made it criminal for an employer to pay or deliver any money or other thing of value to a labor organization only when that organization was the *current* representative of any of the employer's employees, the 1959 version also made such payments and deliveries criminal when they were made to "any labor organization ... [that] seeks to represent, or would admit to membership" any of the employer's employees. *Compare* 61 Stat. 136, 157 (1947), *with* 73 Stat. 519, 537-38 (1959). Second, whereas the original § 302 made it criminal for a labor organization to "receive or accept, or agree to receive or accept" a payment or delivery of any money or other thing of value from an employer, the 1959 version also made it criminal for a labor organization "to request [or] demand" such a payment or delivery. *See id.*

At the same time as it amended § 302, the 1959 Congress amended § 8(b) of the LMRA, the provision setting out union unfair labor practices, to limit the economic pressure, *e.g.*, strikes and picketing, that unions could use to induce voluntary recognition by an employer. Notably, Congress expressly permitted unions to picket an employer for voluntary recognition without a Board election for "a reasonable period of time, not to exceed thirty days." LMRA § 8(b)(7)(C), 29 U.S.C. § 158(b)(7)(C).

Because Congress' express grant of permission to unions to *picket*—and thereby *pressure*—an employer to accord voluntary recognition would make no sense if Congress believed that even a "*request*" for

such recognition would be criminal under § 302, the 1959 Congress' adoption of § 8(b)(7) shows that Congress intended to leave undisturbed the principle that voluntary recognition and requests for such recognition are lawful.

2. The 1947 and 1959 Congresses addressed the subject of union-requested employer boycotts of nonunion firms as well, doing so, again, in a manner utterly inconsistent with Respondent's interpretation of § 302.

a. The 1947 Congress regulated boycotts of nonunion firms in a carefully calibrated manner. The Taft-Hartley Act did not ban all such boycotts but instead made union efforts to cause employers to boycott nonunion firms unfair labor practices only in those instances where the union induced or encouraged *employees* of the employer to withhold their labor so as to pressure the employer to engage in the desired boycott. *See* 61 Stat. at 141 (1947 version of § 8(b)(4)(A)) (prohibiting a union from "induc[ing] or encourag[ing] *the employees* of any employer" to engage in concerted activities aimed at "forcing or requiring any employer ... to cease doing business with any other person") (emphasis added). The Taft-Hartley Congress consequently did *not* designate as an unfair labor practice a *request* for a secondary boycott made by a union directly to the employer. *See id.*

As this Court held in *Local 1976 Carpenters v. NLRB*, 357 U.S. 93, 99 (1958), under the Taft-Hartley Act, "a union is free to approach an employer to persuade him to engage in a boycott, so long as it

refrains from the specifically prohibited means of coercion through inducement of employees," and "if the secondary employer agrees to the boycott ... there is no unfair labor practice."

Nevertheless, on Respondent's interpretation of § 302, the Taft-Hartley Congress, after considering the subject of union efforts to enlist employers in boycotts of nonunion firms, addressing that subject *in terms* in § 8(b)(4), and determining that resulting employer agreements honoring such boycotts do not even present a sufficient threat to federal labor policy to warrant classification as *unfair labor practices*, turned right around and treated such boycott agreements as *criminal* in § 302. That interpretation of § 302 puts the section in direct conflict with the balance of the Taft-Hartley Act.

b. The 1959 Congress revisited both the subject of boycotts of nonunion firms and § 302. And that Congress, like the 1947 Congress, dealt with the subject of boycotts in a way that, again, is fundamentally at odds with Respondent's interpretation of § 302.

Shortly after the Taft-Hartley Act was passed in 1947, a major controversy developed concerning the treatment of so-called "hot cargo" clauses in collective bargaining agreements—clauses that obligated the employer to boycott goods or services from nonunion firms and that consequently created the "top-down" organizing pressure on the employees of such firms described *supra*. Broadly speaking, the NLRB took two positions between 1947 and 1958, when the issue reached this Court in the *Local 1976*

case. As the Court explained, one position was that the clauses were valid and their performance lawfully could be compelled by unions through strike calls or other inducements to employees to pressure the employer to comply. 357 U.S. at 101. The second position was that the clauses were valid but that it was an unfair labor practice for a union to compel compliance through such inducements. *Id.* at 101-02. Notably, even those Board members in the minority who contended for a third position, that the clauses were facially invalid under § 8(b)(4), made no suggestion that § 302 applied and made such clauses criminal, even though those members looked outside § 8(b)(4)—and indeed outside the entire LMRA, to the Interstate Commerce Act—to support that position. *Id.* at 104.

In *Local 1976* the Court adopted the second of the Board's positions. *Id.* at 106-07; *see also id.* at 108 ("[c]ertainly the voluntary observance of a hot cargo provision by an employer does not constitute a violation of § 8(b)(4)(A)").

It was against this backdrop that Congress in 1959, after revisiting *both* the LMRA's provisions concerning boycotts of nonunion firms *and* § 302, did the following:

First, Congress enacted a new § 8(e) that, while permitting "hot cargo" agreements in the garment and construction industries, prohibited them elsewhere as an unfair labor practice. 29 U.S.C. § 158(e). Second, Congress chose to preserve the principle that neither a union request to an employer to boycott another firm nor an employer's honoring of such a request is an unfair labor practice. *See NLRB v. Servette, Inc.*, 377 U.S. 46, 54 (1964). Third, Congress

rejected a proposal to criminalize unlawful secondary boycotts. 105 Cong. Rec. 6670-71 (1959).

Senator Kennedy, the chief Senate sponsor of the 1959 bill, captured the essence of the "hot cargo" compromise as follows: "I would not say that the union should have the right to say to the contractor, 'If you do not do as we ask, we are going to strike against you.' But at least the union should have the right to say to the employer, 'Our relations will be far better if you do not deal with employer A.'" *Id.* at 6668.

At the same time, the 1959 Congress also adopted the amendments to § 302 described above, including the amendment that made it a crime for a union "to request" a "payment, loan or delivery" of "any money or other thing of value" from an employer. On Respondent's construction of § 302, Congress, in so doing, necessarily would have been criminalizing through those amendments both a union "request" to an employer that the employer boycott a nonunion firm and an employer decision to honor such a request. Congress would therefore have been tacitly negating in § 302 all the careful work it had done in § 8 of the LMRA to provide that such *requests* are lawful; that employer actions *honoring* such requests are lawful; that employer-union *agreements* to this effect are lawful in the construction and garment industries; and that neither requests, nor honoring such requests, nor employer-union boycott agreements are *criminal* under the LMRA in *any* context. The interpretation of § 302 set out in the Complaint thus puts that provision in clear conflict with other specific provisions of the LMRA.

Indeed, Respondent's interpretation has an even deeper flaw. This Court repeatedly has held that in

enacting LMRA § 8, captioned "Unfair labor practices," Congress did not merely lay down a set of labor-relations practices that are prohibited; rather, it considered a wider field of labor-relations practices and, by deciding not to prohibit under § 8 a given practice in that field, made the concomitant judgment that the practice was to be permitted and left free from regulation. *See, e.g., Teamsters v. Morton*, 377 U.S. 252, 260 (1964) (holding (i) that the LMRA Congress deliberately permitted unions to make, and employers to honor, requests to engage in secondary boycotts; (ii) that a state common-law doctrine proscribing such requests conflicted with the LMRA; and (iii) that, consequently, the Court would vacate "the damages awarded against the petitioner based upon its peaceful persuasion of [the employer's] management not to do business with the respondent").

Among the practices designedly left to be free from regulation are numerous practices involving union "request[s]" or "demand[s]" for employer action favorable to union institutional interests, including the institutional interest in organizing unorganized employees. For example, in *NLRB v. Drivers*, 362 U.S. 274 (1960), the Court held that, because the 1947 Congress focused on the topic of union recognitional picketing in LMRA § 8(b)(4) and did so in a way that did not bar such picketing in cases where the union had lost a Board representation election, the NLRB erred in relying on a more general LMRA provision, *within § 8 itself*, that prohibited union "restraint or coersion" of employers, to deem such picketing an unfair labor practice.

Yet on Respondent's conception of the LMRA, § 8 would be largely overshadowed by § 302. Sections 302(a)-(b) would for the first time be deemed to apply

to a host of long-accepted labor-relations "request[s]" and "demand[s]," and to employer actions that are a favorable response to such requests and demands, that § 8 does not make unfair labor practices. And one of two consequences would necessarily follow: *Either* § 302 would displace § 8 as the principal locus of federal regulation of this host of labor-relations matters, contrary to decades of precedents of this Court treating § 8 as that locus. *Or*, despite the fact that § 302(c) enumerates nine specific exceptions from its general prohibition, innumerable additional exceptions to § 302 would have to be implied into the statute to avoid conflict with the legislative judgments embodied in § 8, so that in each case where a union "request[ed]" or "demand[ed]" an employer action beneficial to a union institutional interest, the courts would have to inquire whether the action was within the field covered by § 8 and therefore impliedly excepted from § 302's general prohibitions. *Cf. Machinists v. Wis. Employment Relations Comm'n*, 427 U.S. 132, 144 (1976) (engaging in such an inquiry where state law was alleged to be field-preempted by LMRA).

The first consequence is self-evidently unacceptable. And the second consequence is unacceptable as well. To begin with, it is improper to imply exceptions to a statutory provision that has express exceptions. *See Hillman v. Maretta*, 133 S. Ct. 1943, 1953 (2013). Perhaps more fundamentally, § 302 is a criminal statute, and that brings into play another canon of statutory construction—the rule of lenity—pursuant to which courts must construe criminal statutes to avoid making culpability turn on uncertain standards of conduct. *See Skilling v. United States*, 130 S. Ct. 2896, 2932-33 (2010) (holding that, because there was no clear line separat-

ing which undisclosed-conflict-of-interest transactions had and had not been treated as criminal "depriv[ations] [of] another of the intangible right of honest services," the rule of lenity required that the statute be construed not to reach that type of transaction at all). The lines separating conduct prohibited by § 8, conduct intentionally left unregulated by § 8, and conduct simply outside the scope of § 8 are often quite uncertain. *See generally Machinists*, *supra*. And, while that type of uncertainty is tolerable when the consequences of guessing wrong are civil remedies, this Court's decisions teach that this type of uncertainty is wholly unacceptable where criminal sanctions are involved. *E.g.*, *Skilling*, *supra*.

The interpretation of § 302 that we have tendered avoids both of these consequences. For under that interpretation, § 302's operative phrases set a clear, definite standard of conduct and are in harmony, not conflict, with the balance of § 302 itself and with the LMRA statutory scheme as a whole.

II. UNDER § 302 AS PROPERLY INTERPRETED, THE CHALLENGED CLAUSES IN THE RECOGNITION-PROCESS AGREEMENT ARE LAWFUL

Once it is recognized that § 302's operative phrases apply only to employer transfers of money or other assets having commercial value in the market and do not criminalize any and all employer-union interactions that are subjectively desirable or objectively useful to unions, it becomes a straightforward matter to conclude that § 302 does not make criminal the challenged clauses in the Agreement here.

A. The Neutrality Clause Is Lawful

The first challenged clause sets out as a ground rule that "[t]he Employer will take a neutral approach to unionization of Employees." Pet. App. 79. There are multiple reasons why the Respondent's attack on this clause fails.

1. An employer's decision not to campaign against a union is not something that is "pa[id], len[t], or deliver[ed]" to anyone, let alone to a union, as it involves no transfer of any asset, or of anything at all, from one person to another. *See supra* at 8. That is sufficient to defeat Respondent's attack.

Additionally, an employer's decision not to campaign against a union is not "any money or other thing of value." It is not money and it is not an asset of general commercial value in the employer's possession that the employer can sell or monetize in the market, let alone one that is capable of being diverted from employee wages or benefits into a union's treasury. An employer's neutrality decision is thus outside the reach of § 302 for this reason as well. *See supra* at 9-11.

2. Beyond this, an employer's decision not to campaign against a union cannot possibly constitute a crime under § 302 because an employer has a free-speech right, protected expressly by LMRA § 8(c), 29 U.S.C. § 158(c), to take any position it wishes in respect to unionization, *see Chamber of Commerce v. Brown*, 554 U.S. 60, 66-67 (2008), including remaining neutral or even expressing affirmative *support* for a union, *Coamo Knitting Mills*, 150 N.L.R.B. 579, 580-81 (1964).

Respondent concedes this point. Resp.'s Mem. in Support of Pet. at 17 n.13. But Respondent says that

the theory of his Complaint is that where, as here, an employer enters into an *agreement* to be neutral, the outcome is different, because the employer then is "deliver[ing]" to the union "contractual control" over the employer's free-speech right. *Id.*

That argument does not withstand a moment's inspection. Section 302(a) makes it unlawful for an employer to "pay, lend, or deliver, or agree to pay, lend or deliver, any money or other thing of value." 29 U.S.C. § 186(a). Section 302(a) thus prohibits *only* those "agree[ments]" that require the employer "to pay, lend, or deliver" something that would be impermissible to "pay, lend, or deliver" in the absence of an agreement. If an "agreement" were something that itself could be "pa[id], len[t], or deliver[ed]," then it would be superfluous for Congress to address the topic of "agree[ments]" separately and in terms in § 302(a). The only natural reading of § 302(a)—and the only reading that avoids this redundancy—is to read the "agree[ment]" clause as serving to ensure that the employer who *agrees* to "pay, lend, or deliver any money or other thing of value" can be prosecuted for an inchoate crime, or enjoined, before the employer actually executes the payment, loan, or delivery in question.

Furthermore, the argument advanced by Respondent—that an employer that agrees to remain neutral on unionization "deliver[s]" to the union "control" over the employer's communications—is directly analogous to an argument that this Court considered and rejected as making "a nonsense of words" just last Term. *See Sekhar*, 133 S. Ct. at 2727 ("No fluent speaker of English ... would say that a person '*obtained and exercised* another's right to

free speech.' He would say ... that a person '*forced* another to make a statement.'" (emphases in original)).[2]

3. While the foregoing is more than sufficient, we would add that Respondent's "agreement" argument, if accepted, would have far-reaching implications that even Respondent recoils from. If, as Respondent would have it, any permissible unilateral employer action becomes criminal if the employer promises to take that action in an agreement with a union, then every agreement providing for voluntary recognition would be criminal, even though it has long been settled that an employer properly can agree, in advance, voluntarily to recognize a union. *Kroger Co.*, 219 N.L.R.B. 388, 389 (1975) (holding that such advance-recognition agreements are enforceable). Respondent, by framing his Complaint so as studiously to avoid making a challenge to the voluntary recognition clause in the Agreement, *see supra* at 2, must

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[2] While the Complaint here contains boilerplate alleging that the neutrality clause and the other two challenged clauses have "monetary and market value," Pet. App. 70, those allegations are, as explained in the Petitioner's Brief, entirely conclusory and therefore are not to be deemed true under *Ashcroft v. Iqbal*, 556 U.S. 662, 677-79 (2009). *See* Pet. Br. at 61. The Complaint does not, nor could it, allege any specific facts showing that there is a market in which the Employer or the Union could have sold or otherwise transferred for money any of the rights the Employer exercised by agreeing to the challenged clauses, including its free-speech right to remain neutral on unionization. What the Complaint does properly allege is that the Union here subjectively desired the clauses and was willing to provide consideration to secure them.

realize this. But, by omitting a challenge to that clause from his Complaint, Respondent cannot obscure the fact that the premise of his argument, if taken seriously, would lead to the rejection of another settled legal doctrine.

Respondent tries to minimize the impact of his interpretation on settled law by asserting that employers that enter into voluntary recognition agreements with unions are not "materially assisting their organizing campaigns," whereas employers that agree to remain neutral are providing material assistance. Resp.'s Mem. in Support of Pet. at 16-17 n.12. That assertion is risible. Recognition without an election enables the union, on demonstrating majority support through, *e.g.*, authorization cards, to declare the successful end to its campaign without the need to undergo a lengthy and expensive representation-case election process and often without the need to counter any new or redoubled employer efforts to dissuade employees from supporting union representation. That is at least as "material" a form of "assistance," in Respondent's terms, as is neutrality.

B. The Access-to-Premises Clause Is Lawful

The second clause in the recognition-process Agreement that Respondent challenges sets a ground rule allowing the union to "engage in organizing efforts in non-public areas of the [employer's] gaming facility during Employees' non-working times." Pet. App. 80. Here, too, there is no violation of § 302.

1. As is the case with respect to neutrality, an employer that permits a union the sort of limited and conditional access to its property contemplated by

the Agreement here is not transferring to the union any money or other asset and is therefore not effectuating any "payment, loan, or delivery" to the union. The employer is instead merely exercising its *own* right to determine whom to invite on and whom to exclude from its property and is not *conveying to the union* anything in the nature of an easement over the property, a leasehold, or any other right to exclusive use or possession of any portion of the premises in question. Put simply, here all the Employer is doing is telling the Union that it will not evict Union representatives as trespassers so long as their activities on the property are limited in the manner specified in the Agreement; the Employer is giving the Union no right to evict others.

Not only is there no "payment, loan or delivery" effectuated by this clause, there is no transfer by the Employer to the Union of any money or other Employer asset that has commercial value in the market and thus no transfer of "any money or other thing of value." Put another way, the grant of permission involves no diversion to the Union of an Employer asset that the Employer otherwise could have monetized to pay employees higher wages or benefits.

The situation here therefore stands in stark contrast to that presented in *United States v. Schiffman*, 552 F.2d 1124, 1126 (5th Cir. 1977), cited by Respondent, where the employer, a hotel operator, agreed to allow union representatives to stay overnight at the hotel at rates sharply below those it charged to its most favored customers and even below its per-room cost. By not paying the employer

the regular rate, the representatives there *were* engaged in the diversion of an employer asset—indeed the Employer's very stock in trade—to their own use.

2. Any interpretation of § 302 that would have it reach all instances where an employer permits union representatives to come onto or stay on its premises in circumstances where the permission is "subjectively desirable" to the union and "objectively useful" would be unsound, not only for the reasons just given, but for the added reason that it would again upset decades of established law and practice.

a. Provisions in collective bargaining agreements that grant access to employer premises to union representatives who are not employees of the employer have been common since before the enactment of § 302 in 1947. *See Cities Serv. Oil Co.*, 25 N.L.R.B. 36, 50 (1940) ("The right of access [to non-employee union grievance handlers] is a common provision in contracts.... Union representatives are permitted to enter the shop for the purpose of discussing grievances with the employees in [21 listed] industries."). Indeed, it is well settled that the subject of access by union representatives to company property is a mandatory subject of bargaining. *E.g.*, *Granite City Steel Co.*, 167 N.L.R.B. 310, 315-16 (1967).

What is more, both before and after 1947, the NLRB has held that even when there is no contract provision on point, the employer is *required*—under certain circumstances, as determined through a multi-factor balancing test—to grant access to non-employee union representatives, including access necessary to permit such representatives to investi-

gate grievances and conduct safety inspections. *See, e.g., Holyoke Water Power Co.*, 273 N.L.R.B. 1369, 1370 (1985) (employer violated § 8 in denying access); *Cities Serv. Oil Co.*, 25 N.L.R.B. at 47 (same).

This whole body of law would be wrong—and countless employers and unions would have been committing crimes on a daily basis—if, as the theory of the Complaint would have it, an employer, in granting access to its property to union representatives, is "pay[ing], lend[ing], or deliver[ing] any money or other thing of value" to a union, and a union in "request[ing]" such access is likewise violating § 302.

b. It is no answer to this objection to Respondent's theory that the access at issue in the above-cited cases is access by a union serving as the incumbent exclusive bargaining representative, as opposed to a union seeking to organize an employer's employees. For there is nothing in the text of § 302 that would permit the meaning of the phrase "pay, lend, or deliver, or agree to pay, lend or deliver any money or other thing of value ... to a labor organization" to vary depending on the status of the labor organization as an exclusive representative or not. Indeed, the Taft-Hartley Act covered only "pay[ments]" or "deliver[ies]" to unions that were *current* representatives of at least some of the employer's employees, 61 Stat. 136, 157 (1947); the language extending the prohibition to unions that "seek[ ] to represent, or would admit to membership" the employer's employees was added in 1959 but with no change to the "any money or other thing of value" clause. And, the archetypal payments that

Congress enacted § 302 to prevent were the per-ton royalty payments from mine owners to the United Mine Workers' treasury for unspecified employee-welfare purposes that that union had been demanding in collective bargaining *in its capacity as exclusive bargaining agent*. *See supra* at 10-11.

Quite apart from that, even an organizing union that *lacks* the status of exclusive representative has a right of access to an employer's premises in two important circumstances. First, an employer must provide access to union representatives when the employer has granted access to similarly situated third parties. *NLRB v. Stowe Spinning Co.*, 336 U.S. 226, 233 (1949); *Lucile Salter Packard Children's Hosp. v. NLRB*, 97 F.3d 583, 587 (D.C. Cir. 1996). Second, "if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956). Respondent's interpretation of § 302 would criminalize employer grants of access to unions that these decisions require, which would create yet another conflict with the LMRA and established precedents construing it.

Equally to the point, even in those cases holding that, under particular circumstances, the employer is not *required* to provide access to a union, the implication is always that the employer is *permitted* to provide access to a union as a matter of choice in determining how it will exercise its property rights; and there is not even the slightest hint that an

employer is ever *prohibited* from providing such access. *See, e.g., Babcock & Wilcox*, 351 U.S. at 112 ("It is our judgment, however, that an employer *may* validly post his property against nonemployee distribution of union literature...") (emphasis added). Yet on Respondent's theory, there can be no middle ground: whatever access an employer is not required to provide, it is criminally prohibited from providing. That theory, if adopted, would thus establish an unprecedented *restriction* on the ability of employers to exercise their property rights.

Finally, there is a powerful additional reason to reject the position that § 302 prohibits union requests for, and employer grants of, access to employer premises whenever employers are not required to grant such access. As we have explained, § 302, as a criminal provision, must be construed in accordance with the rule of lenity, and the distinctions made in the access-to-premises jurisprudence are too blurry for criminal culpability to turn on them. *See Skilling*, *supra*; *see also id.* at 2932 (lenity especially appropriate in regard to statutes, such as § 302, that are "predicate offense[s] under [the Racketeering Influenced and Corrupt Organizations Act], 18 U.S.C. § 1961(1)"). Thus § 302 should not be construed to treat access to employer premises as the "deliver[y]" of a "thing of value."

C. The Access-to-Employee-Contact-Information Clause Is Valid

The last of the three challenged clauses provides that the Employer will share employee names, job classifications and home addresses with the Union for purposes of reaching the employees in connec-

tion with the union's organizing effort. This clause too is valid, for there are no allegations in the Complaint setting forth specific facts that would establish that this information has commercial value in the market. That is not surprising because its only value is a labor-relations value to a union engaged in an effort to organize the Employer's employees. It thus has value *only* to the Union and is no more a § 302 "thing of value" than voluntary recognition itself.

Indeed, the list contemplated by the Agreement is a list similar in kind to the list of employee names and contact information that the NLRB, with approval from this Court, long has required employers to make available in the course of election campaigns conducted under the Board's supervision. *Excelsior Underwear*, 156 N.L.R.B. 1236, 1239-46 (1966); *NLRB v. Wyman-Gordon*, 394 U.S. 759, 767 (1969). On Respondent's theory, that long-established rule would conflict with § 302.

There are, moreover, countless circumstances outside the *Excelsior Underwear* context where an employer is required to grant union requests for information, *see, e.g, NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153-54 (1956), including for information just like that at issue here, *NLRB v. Ill.-Am. Water Co.*, 933 F.2d 1368, 1377-78 (7th Cir. 1991). And, as with respect to the access-to-premises issue, even where the circumstances do not *require* the employer to share the information in question with the union, the cases never have suggested that employers are *prohibited* from doing so. They have proceeded instead on the premise that, where not required, sharing

information is a matter of employer choice. *See, e.g.*, *Torrington Extend-A-Care Emp. Ass'n v. NLRB*, 17 F.3d 580, 589-90 (2d Cir. 1994). Thus, the same considerations set out above in our discussion of the access-to-premises issue apply with equal force in the context of the access-to-information issue.

III. THE ELEVENTH CIRCUIT IMPROPERLY INSERTED AN INTENT REQUIREMENT INTO § 302

While rejecting Respondent's position that the clauses at issue here are facially invalid, the court of appeals allowed this action to survive the pleading stage by declaring that the validity of those clauses turns on the factual issue of the parties' *intention* in entering into them—*i.e.*, on "the reason why Unite and Mardi Gras agreed to cooperate with one another," Pet. App. 9. According to the court of appeals, "[i]f employers offer organizing assistance with the intention of improperly influencing a union," then § 302(a)(2) is implicated. *Id.* 8.

The fatal defect in the Eleventh Circuit's ruling is that the only paragraph in § 302(a) that the Complaint alleges the Agreement violated—paragraph (a)(2)—sets out a strict liability offense and includes no intent or other scienter element. That paragraph makes it unlawful for "any employer .... to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value ... to any labor organization ... which represents, seeks to represent, or would admit to membership, any of the employees of such employer." In stark contrast, the two following paragraphs in § 302(a), which apply to employer

payments to persons other than labor organizations, *do* include a scienter element. Section 302(a)(3) includes an express "purpose" requirement, and § 302(a)(4) includes an express "intent to influence" requirement. 29 U.S.C. §§ 186(a)(3), (a)(4).

The Eleventh Circuit did not explain how a scienter requirement could be grafted onto § 302(a)(2), given that Congress' inclusion of such a requirement in the following two paragraphs shows that its exclusion of such a requirement in § 302(a)(2) was deliberate. Its interpretation of § 302(a)(2) is thus untenable, and this Court should reject it.

CONCLUSION

For the foregoing reasons, the decision of the Eleventh Circuit should be reversed and remanded with instructions to reinstate the district court's dismissal of this action for failure to state a claim on which relief may be granted.

Respectfully submitted,

LEON DAYAN
Counsel of Record
LAURENCE GOLD
Bredhoff & Kaiser, P.L.L.C.
805 15th Street, N.W.,
Suite 1000
Washington, D.C. 20005
Telephone: (202) 842-2600
ldayan@bredhoff.com

CRAIG BECKER
LYNN RHINEHART
JAMES B. COPPESS
American Federation of Labor
and Congress of Industrial
Organizations
815 16th Street, N.W.
Washington, D.C. 20005
Telephone: (202) 637-5310

JUDITH A. SCOTT
WALTER KAMIAT
MARK SCHNEIDER
Service Employees
International Union
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
Telephone: (202) 730-7455

ALICE O'BRIEN
PHILIP A. HOSTAK
National Education
Association
1201 16th Street, N.W.
Washington, D.C. 20036
Telephone: (202) 822-7035

AMICUS CURIAE BRIEF

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In the

Supreme Court of the United States

UNITE HERE LOCAL 355,

Petitioner,

v.

MARTIN MULHALL; HOLLYWOOD GREYHOUND TRACK INC. D/B/A MARDI GRAS GAMING,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICUS CURIAE* OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF RESPONDENTS

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Center for Constitutional Jurisprudence
c/o Dale E. Fowler School of Law at Chapman University
One University Drive
Orange, CA 92866
Telephone: (714) 628-2666
E-Mail: caso@chapman.edu

Counsel for Amicus Curiae
Center for Constitutional Jurisprudence

QUESTIONS PRESENTED

Section 302(a)(2) of the Labor Management Relations Act makes it unlawful for an employer to "pay ... any ... thing of value . . . to any labor organization," with exceptions inapplicable here. 29 U.S.C. § 186(a)(2).

Are employer concessions that are admittedly exchanged in return for union political contributions in excess of $100,000, a no strike promise, and other valuable promises by the union a "thing of value" for purposes of Section 302 of the Labor Management Relations Act?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, the Claremont Institute's Center for Constitutional Jurisprudence,[1] is dedicated to upholding the principles of the American Founding, including the freedom from compelled association – a liberty supported by the statute at issue in this case. The Center participates in litigation to defend these principles and has participated in litigation before this Court in several cases including *Knox v. Service Employees International Union*, 132 S.Ct. 2277 (2012) and *Harris v. Quinn*, No. 11-691 (petition for writ of certiorari pending).

SUMMARY OF ARGUMENT

Section 302 of the Labor Management Relations Act, 29 U.S.C. 186 makes it a crime for an employer to pay any "thing of value" to a labor union or its representatives, and for a labor union to "request, demand, receive, or accept, or agree to receive or accept, any payment ... [of a] thing of value." When amendments to Section 29 U.S.C. § 186 were passed it 1959, the amendments were intended to "remove any doubt that *all* forms of bribery and extortion which might escape the provisions of existing law would be prohibited under pain of criminal penalties

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief by filing blanket consents with the Clerk.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

for conviction thereof." H.R. Rep. No. 86-741(1959), *reprinted in* 1959 U.S.C.C.A.N. 2318, 2467 (emphasis added); *see Hotel Employees & Rest. Employees Union, Local 57 v. Sage Hospitality Res., LLC*, 390 F.3d 206, 219 (3d Cir. 2004).

In this case a labor union seeking to become the exclusive bargaining representative for employees of Mardi Gras Gaming entered into an agreement with Mardi Gras to gain the employer's assistance in that organizing effort. The union requested that Mardi Gras provide union representatives access to non-public work premises to organize employees during non-work hours; provide the union a list of employees, their job classifications, departments, and addresses; and remain neutral to the unionization of employees. In exchange, Unite Here promised to lend financial support to a ballot initiative regarding casino gaming and to refrain from picketing, boycotting, striking, or undertaking other economic activity against Mardi Gras if it became the exclusive bargaining representative for the employees. The financial support by Unite Here for the ballot initiative ultimately amounted to more than $100,000.

Since the aim of 29 U.S.C. § 186 is to prevent bribery and extortion in all forms related to labor relations, it follows that the term "thing of value" should be given the same broad interpretation that it is afforded in every other statute that imposes criminal or civil penalties on those who engage in acts of bribery or extortion. It is particularly imperative that the Court apply a broad construction to this statute that seeks to protect the interests of individual workers from potential corruption by Unions or

Employers. For this reason, this Court should affirm the holding of the Eleventh Circuit.

ARGUMENT

I. Monetary Worth Is Not The Sole Measure Of A "Thing Of Value" In The Context Of A Criminal Statute.

A. "Thing of value" is a term of art that encompasses promises as well as physical objects.

The term "thing of value" is found in so many criminal statutes throughout the United States that the phrase has become a legal term of art. After repeated analysis of the meaning of this term, Circuit Courts of Appeals have uniformly rejected arguments that "thing[s] of value" should be restricted to things of monetary, commercial, objective, actual, or tangible value.[2] Quite the contrary, the term has been used to cover a wide variety of tangibles and intangibles.

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[2] *United States v. Marmolejo*, 89 F.3d 1185, 1191 (5th Cir.1996) (conjugal visits (construing 18 U.S.C. § 666)); *United States v. Schwartz*, 785 F.2d 673, 679-81 (9th Cir. 1986) (providing assistance in arranging a merger is a "thing of value"); *See also United States v. Nilsen*, 967 F.2d 539, 542-543 (11th Cir. 1992) (monetary worth is not the sole measure of value); *United States v. Williams*, 705 F.2d 603, 622-623 (2d Cir. 1983) (holding "anything of value" is not limited to what objectively has actual value); *United States v. Sheker*, 618 F.2d 607, 609 (9th Cir. 1980) (information regarding the whereabouts of a witness); *United States v. Zouras*, 497 F.2d 1115, 1121 (7th Cir.1974) (a witness's testimony).

In *United States v. Girard*, 601 F.2d 69 (2nd Cir. 1979), the Second Circuit concluded that the term "thing of value" is not limited simply to tangible property, but also includes the sale of information. *Id.* at 71. Under this broad construction the frequently used test of value is whether the recipient subjectively attaches value to the thing received. *See United States v. Gorman*, 807 F.2d 1299, 1304-05 (6th Cir. 1986) ("the focus ... is to be placed on the value which the defendant subjectively attaches to the items received"); *Schwartz*, 785 F.2d, at 680 ("The significant factor is that the trustee sufficiently valued the thing offered to compromise his integrity and position."); *Williams*, 705 F.2d, at 623. The principle of subjective attachment of value is best explained by the Eleventh Circuit in *Nilsen*, 967 F.2d 539. It is immaterial whether the other party to the transaction places a value on the promise demanded. Instead, it is "[t]the conduct and expectations of [the] defendant [that] establish whether an intangible objective is a 'thing of value.'" *Id.*, at 543.

While the Petitioner in the instant case may argue that it asked for nothing of value from Mardi Gras, there was clearly a subjective value placed on the concessions made by the employer. In fact, an explicit contractual provision memorializes the Union's promise to exchange lobbying assistance for the employer's concessions. For this reason this Court should affirm the holding of the 11th Circuit and find that employer concessions are things of value under Section 302.

B. In enacting section 302, Congress sought to prohibit the exchange "things of value" that are not easily defined by monetary value.

When Congress uses well-settled terminology of criminal law, the courts presume those words to have their ordinary meaning and definition. *Salinas v. United States*, 522 U.S. 52, 63 (1997); *Morissette v. United States*, 342 U.S. 246, 263 (1952). Congress has used the well-settled term of art, "thing of value," in numerous statues.[3]

Within the context of statutes that seek to prevent and penalize bribery and extortion, the courts have consistently interpreted "thing of value" to cover items which are not easily defined as monies, tangibles, intangibles, or any other good."[4] Thus

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[3] See, e.g., 18 U.S.C. § 201(b)(1) (prohibiting bribery of public officials and witnesses using "anything of value"); 18 U.S.C. § 210 (prohibiting bribery to procure appointive office using "any money or thing of value"); 18 U.S.C. § 666(a)(1)(B) (prohibiting bribery in connection with a federal program with "anything of value"); 18 U.S.C. § 875(a) and (d) (prohibiting making kidnapping threat with intent to obtain "any money or other thing of value"); 18 U.S.C. § 876(b) and (d) (prohibiting extortion of "any money or other thing of value" using the mail); 18 U.S.C. § 1954 (prohibiting bribery in connection with an employee benefit plan with "any fee, kickback, commission, gift, loan, money, or thing of value").

[4] Wm. Oldnall Russell, A TREATISE ON CRIMES AND MISDEMEANORS 573-574 (8th ed. 1923) ("Extortion...signifies the unlawful taking by any officer, by colour of his office, of any money or thing of value."); *See also* Joel P. Bishop, BISHOP ON CRIMINAL LAW § 401, at 331-332 (9th ed. 1923) ("In most cases, the thing obtained is money...But probably anything of value will suffice."); Francis Wharton, A TREATISE ON CRIMINAL LAW §

when Congress uses the term in a statute, the courts consistently apply it broadly to cover those items which *have value* objectively or subjectively, but whose value is not easy to quantify.[5]

Section 302 prohibits an employer from paying (and a union from demanding payment), lending, or delivering "any money *or* other thing of value." (Emphasis added.) In *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), this Court "refused to ignore the statutory meaning which would be presumed from similar disjunctive language," stating that "the use of the term 'or' indicates an intent to give the nouns their separate, normal meanings." *Id.* at 339. *See Garcia v. United States*, 469 U.S. 70, 73 (1984) ("Canons of construction indicate that terms connected in the disjunctive in this manner be given separate meanings.").

The Fourth Circuit came to a contradictory conclusion in *Adcock v. Freightliner LLC*, 550 F.3d 369 (4th Cir. 2008). That court held that in order for Section 302 to apply, monetary value *must* be assigned to the "thing of value." *Id.*, at 375. *Adcock*, however, represents a minority of cases that have ignored the basic statutory construction. The Fourth Circuit based its decision in part on the fact that it could not ascertain the monetary value of the employer's concession. Yet that does not mean that the

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1898, at 2095 (11th ed. 1912) ("it is enough if any valuable thing is received").

[5] Although this Court has not passed on the question, lower courts recognize the phrase "thing of value" to include intangible rights. *See United States v. Girard*, 601 F.2d, at 71 (2d Cir. 1979).

concession had no value. Indeed, the union gave up several valuable rights in return for the concession, including its rights to bargain for increased pay. *Id.*, at 372. The Fourth Circuit's approach was unduly narrow and, importantly, failed to protect workers from a labor union that may be more interested in securing exclusive bargaining recognition than in representing the interests of the workers.

This Court has also stated "that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Congress did not limit Section 302 to demands for money, but also included demands for "things of value." "Value" embodies notions of worth, and is generally defined in terms of what the other party to the transaction is willing to trade in exchange. *See Regents of Univ. of California v. Pub. Employment Relations Bd.*, 485 U.S. 589, 614 n.7 (1988). Whether the item demanded from the employer is a "thing of value," therefore, can be determined by what the union was willing to exchange in order to obtain that item or promise.

II. Control Over Communication To Non Union Employees, Employee Names And Addresses, And Access To Private Property All Constitute "Things Of Value".

This Court has long defined fair market value as what a "willing buyer" would pay to a "willing seller." *United States v. Cartwright*, 411 U.S. 546, 550-51 (1973). The key factor in this definition is the exchange. If parties are willing to make the exchange, the value on each side of the transaction is what the other party is willing to exchange. The Court can

thus determine whether a promise is a "thing of value" by looking to whether the other party promised anything in exchange. This *quid pro quo* indicates that the parties to the transaction attached value to the promises exchanged. *See Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 89-90 (1982). Reciprocal obligations are themselves compensation, or value. *See Regents of Univ. of California*, 485 U.S., at 614 n.7. The reciprocal promises define the value of each other. *See United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 567 (1960).

Concessions Unite Here demanded of Mardi Gras are thus "things of value" if the union was willing to exchange something valuable for those concessions. The obvious payment of value by the union was the financial support for the ballot initiative backed by Mardi Gras. The union itself admits it spent more than $100,000 in time and money on the initiative effort. Pet. App. 44, 48.

That was not all that the union was willing to pay for these concessions, however. In addition to the political support, the union promised it would not boycott or picket Mardi Gras. The union estimates that a boycott would have cost the employer more than $100,000 lost business. *Id.* The union also agreed that it would not picket or strike the employer during the organizing process. *Id.* at 79, 82. This Court has previously noted that no-strike provisions are valuable contract provisions that may support a claim for damages if violated. *See Atkinson v. Sinclair Ref. Co.*, 370 U.S. 238, 249 (1962) (holding that damages action was only available against union, not union officials).

Unite Here also placed a value on employee information and access to the employer's property. Lists of employees with their names, addresses, and other identifying information have a monetary market value and are frequently purchased by entities who clearly attach a monetary value to the list. *See Trans Union Corp. v. F.T.C.*, 245 F.3d 809, 811-12 (D.C. Cir. 2001). In addition, the use of employer property and facilities that are restricted to employees clearly implicates property rights which have both objective and subjective value. *Truax v. Corrigan*, 257 U.S. 312, 327 (1921). In fact, the Fifth Circuit has explicitly held that the use of office space is a "thing of value" under Section 302. *NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849, 856 (5th Cir. 1986) (holding that § 302 was not violated because union official was also a company employee). Lease value can easily be assigned to the right to occupy a piece of property.

Unite Here placed a very high value on the concessions it demanded from the employer. The union was willing to spend significant funds and promise to refrain from otherwise lawful conduct all to obtain a favored position in its attempts to gain recognition as the exclusive bargaining representative. The union believes this favored position has an economic value. The union's belief in this value is well-founded.

It is no great mystery why the union would be willing to pay so much to gain access to employer property and information about employees. The union that secures position of exclusive bargaining representative also secures tremendous financial advantages.

In an early compelled union fee case, this Court noted that the AFL-CIO spent $3.1 million dollars over the course in three years in the late 1950's on political activity alone. *International Association of Machinists v. Street*, 367 U.S. 740, 813 (1961). These expenditures (and thus the collections from employees, voluntary and otherwise) have exploded in recent years. Two terms ago, this Court recounted plans by the Service Employees International Union to join with other unions in California to spend $10 million just in California to battle a series of ballot initiatives in one election. *Knox*, 132 S.Ct., at 2285. Nationally, labor unions spend close to one billion dollars on political campaigns per year. Linda Chavez & Daniel Gray, BETRAYAL: HOW UNION BOSSES SHAKE DOWN THEIR MEMBERS AND CORRUPT AMERICAN POLITICS 29 (Crown Forum 2004). This political spending, which is often at odds with the views of members and represented employees, affords the unions tremendous political clout.

Once the union achieves recognition as the exclusive bargaining representative, the rights of dissident employees come under assault. This Court has issued a number of decisions, including the recent decision in *Knox*, providing some protection for the rights of dissidents. These decisions prohibit unions from compelling dissidents from financing the union's political activities. Yet, as this Court acknowledged in *Knox*, even the "opt-out" protections adopted in prior cases have been a "remarkable boon for unions." *Knox* 132 S.Ct., at 2290. This boon is even greater in light of the fact that unions often refuse to follow the requirements of this Court's prior decisions in order to maximize the assessments they can exact from dissidents in order to spend on political

activities. *See generally* Harry G. Hutchison, *Reclaiming the First Amendment Through Union Dues Restrictions?*, 10 U. Pa. J. Bus. & Emp. L. 663 (2008); Jeff Canfield, *What a Sham(e): The Broken Beck Rights System in the Real World Workplace*, 47 Wayne L. Rev. 1049 (2001); Brian J. Woldow, *The NLRB's (Slowly) Developing Beck Jurisprudence: Defending a Right in a Politicized Agency*, 52 Admin. L. Rev. 1075 (2000) (documenting refusal of unions and government to abide by *Beck* and similar cases).

It should come as no surprise, therefore, that a union would spend $100,000 or more on an employer's political agenda in order to secure an advantage for itself in becoming the exclusive bargaining representative. Exclusive bargaining representative status secures extensive financial resources for the union. The unions then use those financial resources to pursue their political goals. Unite Here saw the grant of access and promise of information about employees as "things of value" – indeed, things of great value – for which it was able to trade its efforts and its cash.

Congress intended the provisions of Section 302 to protect employees from manipulation and harm at the hands of unions and employers. It is the rights of these employees that are at stake and those rights are not protected by allowing a union to demand or even purchase special access and privileges from the employer.

CONCLUSION

This Court should give a consistent meaning to the term "thing of value" as used in this statute and other statutes aimed at the same problem – bribery

and other unlawful influence. If Congress' goal is protection of employees from employers and unions that may work to subvert the bargaining process, the question is fairly simple. A thing of value is what the parties to the agreement in question believe to be valuable. A *quid pro quo* exchange is a clear signal that the parties placed a value on the reciprocal obligations. Here, the union's expenditure of time and money on a political campaign for the employer shows that the union believed it was receiving a "thing of value" from the employer in exchange.

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Respectfully submitted,

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Center for Constitutional Jurisprudence
c/o Dale E. Fowler School of Law at Chapman Univ.
One University Drive
Orange, CA 92866
Telephone: (714) 628-2666
E-Mail: caso@chapman.edu

Counsel for Amicus Curiae
Center for Constitutional Jurisprudence

AMICUS CURIAE BRIEF

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UNITE HERE LOCAL 355,
Petitioner,

v.

MARTIN MULHALL AND HOLLYWOOD GREYHOUND TRACK, INC. D/B/A MARDI GRAS GAMING,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE COUNCIL ON LABOR LAW EQUALITY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

HAROLD P. COXSON
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
1909 K Street NW
Suite 1000
Washington, D.C. 20006
(202) 887-0855
hal.coxson@odnss.com

CHRISTOPHER C. MURRAY
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
111 Monument Circle
Suite 4600
Indianapolis, IN 46204
(317) 916-1300
christopher.murray@odnss.com

ARTHUR B. SMITH, JR.
Counsel of Record
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
155 North Wacker Drive
Suite 4300
Chicago, IL 60606
(312) 807-3619
arthur.smith@odnss.com

CHRISTOPHER R. COXSON
OLGETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
10 Madison Avenue
Suite 400
Morristown, NJ 07960
(973) 656-1600
christopher.coxson@odnss.com

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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BRIEF OF THE COUNCIL ON LABOR LAW EQUALITY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE* [1]

The Council on Labor Law Equality (COLLE) is a trade association founded over 30 years ago for the purpose of monitoring and commenting on developments in the interpretation of the National Labor

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), *amicus* states that letters reflecting the parties' blanket consent to the filing of amicus briefs have been filed with the Clerk's office.

Relations Act (NLRA). Through the filing of amicus briefs and other forms of participation, COLLE provides a specialized and continuing business community effort to maintain a balanced approach in the formulation of national labor policy on issues that affect a broad cross-section of American industry. COLLE is the nation's only brief-writing association devoted exclusively to issues arising under the NLRA and in recent decades has filed amicus briefs in nearly every significant labor case before the National Labor Relations Board (NLRB), the federal courts of appeals, and the U.S. Supreme Court.

COLLE represents employers in virtually every business sector, all of whom are subject to the NLRA. COLLE members have a vital interest in the procedures that govern organizing activities under the NLRA and in ensuring that those procedures provide fairness both to employees and employers and minimize the opportunities for corruption, coercion, and extortion. COLLE is uniquely situated to brief the Court concerning the issues raised by the type of pre-recognition agreement that is at issue in this case and the vast implications that this Court's interpretation of Section 302 of the Labor Management Relations Act (LMRA) in applying it to such agreements will have to the business community beyond the immediate concerns of the parties to this case.

Respondents' briefs provide compelling reasons to affirm the Eleventh Circuit's judgment.[2] The purpose

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[2] COLLE respectfully notes that its position in this brief may not be fully congruent with that of Respondent Hollywood Greyhound Track, Inc. d/b/a Mardi Gras Gaming (Mardi Gras) to the extent that Mardi Gras's brief may be construed as suggesting that pre-recognition agreements are unlawful under Section

of this brief is to provide additional background information regarding unions' increasing reliance on pre-recognition agreements similar to the one at issue in this case and regarding some unions' highly aggressive use of "corporate campaigns" to pressure employers to enter into such agreements. As set forth below, although not all pre-recognition agreements are unlawful, when such agreements are the product of extortionate corporate campaigns, they should be held to violate Section 302(b)(1) of the Labor Management Relations Act, 29 U.S.C. § 186(b)(1).

SUMMARY OF ARGUMENT

A pre-recognition agreement between a union and an employer can, under some circumstances, constitute a thing of value to the union that is paid or delivered in violation of Section 302.[3] In recent years,

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302 even when they do not involve extortion, bribery, or similar misconduct.

[3] As used in this brief, "pre-recognition agreement" refers to an agreement under which an employer waives certain rights that it might otherwise invoke to oppose a union's organizing efforts or agrees to render assistance to the union's efforts that it would not otherwise be required to give, including agreements that require an employer (1) to recognize the union as the exclusive collective bargaining representative of its employees based on a card check procedure rather than an NLRB conducted secret ballot election; (2) to provide the union with access to the employer's premises during non-working times; (3) to provide the union with lists of employee names and addresses; and/or (4) to remain neutral during the union's organizing campaign. Two other types of employer-union agreements are not at issue in this proceeding and are not to be confused with the "pre-recognition agreement" referred to in this brief. The first of these is the so-called "pre-hire" agreement authorized by Section 8(f) of the NLRA, 29 U.S.C. §158(f), which permits only construction industry employers and unions to enter into collective bargaining agreements

as union membership has fallen steeply, many unions have shifted organizing tactics to focus on obtaining pre-recognition agreements from targeted employers. Such pre-recognition agreements constitute an employer's delivering to the union various contractually enforceable waivers of the employer's speech, property, and statutory rights, which the employer otherwise could use to oppose the union's organizing efforts. Some unions believe that they will have a greater chance of being designated as employees' exclusive collective bargaining representatives under such agreements than pursuant to a secret-ballot, NLRB-supervised election as provided for under the NLRA.

Unions regularly launch "corporate campaigns" against employers to compel them to enter into such pre-recognition agreements. Corporate campaigns are designed to impose financial and social pressures on an employer by means of various lawful and, at times, unlawful conduct with the understanding that the union will terminate the campaign only if the employer enters into the pre-recognition agreement demanded by the union.

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even before the construction industry employer has hired any employees. The second of these, also not at issue here, is addressed in *Dana Corp.*, 356 NLRB No. 49, 2010 WL 4963202 (Dec. 6, 2010). That agreement was entered into by an employer and a union with a longstanding collective bargaining relationship to establish procedures for purely voluntary recognition utilizing a card check procedure at a facility not covered by one of the nine collective bargaining agreements executed by the parties; this agreement also contained a list of the substantive issues to be addressed by collective bargaining if and when the union was recognized. In *Dana*, the NLRB determined it would "leave for another day the adoption of a general standard for regulating prerecognition negotiations between unions and employer[s]". 2010 WL 4963202, at *5.

Corporate campaigns can constitute extortionate conduct by unions. A number of courts have already found that employers have stated claims for extortion under state law and for the violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*, relating to union corporate campaigns designed to pressure employers to enter into pre-recognition agreements and/or make other concessions.

In light of the context in which pre-recognition agreements like the one at issue in this case are obtained, and in light of case law already finding that union tactics to pressure employers to enter such agreements can constitute extortion under some circumstances, the Eleventh Circuit's decision in this case was correct. Respondent Martin Mulhall (Mulhall) sufficiently stated a claim that the union violated Section 302 by demanding and seeking to enforce a pre-recognition agreement with the employer.

ARGUMENT

When a union that does not represent an employer's employees demands that an employer grant the union a contractual right to enforce that employer's waiver of property, speech, and statutory rights, which the employer could otherwise use to oppose that union's organizing efforts, does the union request or demand that the employer "pay[]" or "deliver[]" a "thing of value" to the union in violation of Section 302(b)(1)?[4] 29 U.S.C. § 186(b)(1). In this case, the Eleventh

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[4] Or, alternatively, when a union, after having obtained such an agreement, seeks to enforce the employer's contractual waiver of its property, speech, and statutory rights, does the union "request" or "demand" the "payment" or "delivery" of a "thing of value"?

Circuit held that the answer to this question depended on the purpose of the union's and employer's exchange and on whether that exchange was part of "a scheme to corrupt a union or to extort a benefit from an employer." Pet. App. 8.[5] The Eleventh Circuit therefore remanded the case for the district court to "determine the reason why [the union] and [the employer] agreed to cooperate with one another" in this way. Pet. App. 9.

Recent experience shows that pre-recognition agreements like the one at issue in this case can violate Section 302 in some circumstances. The Eleventh Circuit therefore correctly directed the district court to determine whether the particular agreement in this case implicates Section 302's concerns with preventing union bribery and extortion.

To assist the Court in understanding how, as a practical matter, pre-recognition agreements can ever constitute "thing[s] of value" to a union that could be paid or delivered in violation of Section 302, COLLE respectfully submits this brief to provide a more complete account of the factual context in which such agreements often arise. Petitioner and its amici characterize all pre-recognition agreements – agreements under which an employer waives its right to an NLRB-supervised election, waives its property right to exclude third-parties, and waives its right to free speech under Section 8(c) of the NLRA and the First Amendment – as nothing more than agreements whereby unions and employers set ground rules for an organizing campaign and voluntary recognition in accord with the NLRA's goals of "avoid[ing] industrial

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[5] References to materials contained in the Appendix to the Petition for Writ of Certiorari are cited as "Pet. App."

strife and promot[ing] employee free choice." *See, e.g.*, U.S. Amicus Br. 6-7 (Aug. 2013). But these are platitudes. Indeed, notably absent from the briefs of Petitioner and its amici is any discussion of how employers often come to enter into such pre-recognition agreements in reality, why unions have come to demand such agreements with increasing frequency, or how some unions at times attempt to exact such agreements by applying extreme "pressure" on employers in the form of no-holds-barred "corporate campaigns" designed to inflict harm on employers that fail to acquiesce to union demands. This factual context helps make clear that there can be a real and substantial risk that some pre-recognition agreements are things of value to a union that it obtains through extortionate conduct in violation of Section 302.

Petitioner and its amici are also hyperbolic in claiming that the Eleventh Circuit's decision is the death knell of all pre-recognition agreements, will criminalize arbitration as a means for resolving pre-recognition agreement disputes, and will gut settled interpretations of labor agreement union security clauses (29 U.S.C. § 158(a)(3)) and the LMRA secondary boycott (29 U.S.C. § 158(b)(4)(B)) and recognitional picketing (29 U.S.C. § 158(b)(7)) provisions. These exaggerations ignore the fact that the Eleventh Circuit did not conclude that Section 302 had even been violated, only that a claim for relief had been stated. All the Eleventh Circuit's decision did was reverse the district court's grant of a motion to dismiss the complaint and remand the case for a determination as to the reason why the employer and the union agreed to cooperate, namely, whether bribery or extortion, the key predicates for a Section 302 violation, occurred.

I. INTRODUCTION

Section 302(a)(2) of the LMRA makes it unlawful for an employer "to pay, lend or deliver, or agree to pay, lend, or deliver, any money or other thing of value" to a union that "represents [or] seeks to represent" the employer's employees. 29 U.S.C. § 186(a)(2). Section 302(b)(1) similarly makes it unlawful for a union "to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value" as prohibited by Section 302(a)(2). 29 U.S.C. § 186(b)(1).

To avoid repeating at length arguments made in the parties' briefs, COLLE notes that it generally endorses the constructions of Section 302 offered by Respondents and adopted by the Eleventh Circuit below. In light of Section 302's purpose to prevent union bribery and extortion, *see Arroyo v. U.S.*, 359 U.S. 419, 425-26 & n.8 (1959), the phrase "thing of value" as used in Sections 302(a)(2) and (b)(1) logically means a "thing of value" (i) to the union and (ii) in the union's institutional, rather than in its representative, capacity. 29 U.S.C. § 186(a)(2) & (b)(1). This common-sense reading stands in contrast to the strained interpretations offered by Petitioner and its amici.

First, the contention of Petitioner's amicus that Sections 302(a)(2) and (b)(1) must refer only to assets that have "general commercial value in the marketplace" makes little sense in light of the purpose of the statute. *See, e.g.*, AFL-CIO Amicus Br. 6-7. Limiting the reach of Section 302's prohibitions to the transfer of things that have value to individuals and entities *other* than unions would not be consistent with the statute's focus on preventing *union* bribery and extortion. Section 302 is concerned with employers providing to unions "things" that have value to the

union under circumstances that could cause the union's institutional self-interests to diverge from the interests of the employees whom the union represents or seeks to represent. *Cf. Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1290 (11th Cir. 2010) (noting that "[s]ection 302 is 'a conflict-of-interest statute'" that serves to protect employees "from the collusion of union officials and management" (citations omitted)); *Turner v. Local Union No. 302, Int'l Bhd. of Teamsters*, 604 F.2d 1219, 1227 (9th Cir. 1979) ("The dominant purpose of § 302 is to prevent employers from tampering with the loyalty of union officials and to prevent union officials from extorting tribute from employers."). Money, which has an "objective" value, obviously could have such an effect. But so, too, could things that have value only to the union and to no one else. Whether a thing that a union demands or receives from an employer also has value to someone other than the union is irrelevant for Section 302 purposes.

Second, in addition to the Eleventh Circuit's observation that the performance of an obligation may qualify as a payment for Section 302 purposes, Pet. App. 8, an employer's providing a union the contractual right to enforce the employer's waiver of its property, speech, and statutory rights should constitute a "delivery" to the union. *Cf.* BLACK'S LAW DICTIONARY (9th ed.), delivery ("The formal act of transferring something, such as a deed; the giving or yielding possession or control of something to another."). Indeed, it is commonplace to refer to contracts' being "delivered." *Cf. 10 Ellicott Square Court Corp. v. Mountain Valley Indem. Co.*, 634 F.3d 112, 120 (2d Cir. 2011) ("A contract is frequently said to be executed when the document has been signed,

or has been signed, sealed, and delivered." (internal quotation marks and citation omitted)).

Finally, Petitioner and its amici wrongly claim that under Respondent Mulhall's theory in this case and under the Eleventh Circuit's decision, Section 302 could prohibit all employer/union agreements that provide any things that unions value, including all voluntary recognition agreements and even collective bargaining agreements. *See, e.g.*, Pet. Br. 64; AFL-CIO Amicus Br. 26. But this is not the case. The Eleventh Circuit held that the lawfulness of neutrality and cooperation agreements under Section 302 hinges on whether those agreements are part of a corrupt or extortionate scheme. Pet. App. 8. Consistent with this holding, Section 302 should reasonably be read to distinguish between those payments and things of value that a union receives in the union's *institutional capacity* on behalf of itself and those that it receives in its *representative capacity* on behalf of employees.[6] It is only an agreement that the union makes while operating in the former capacity – before the union becomes employees' designated bargaining representative or while the union otherwise is acting outside the scope of its agency relationship with employees – that would potentially run afoul of Sections 302(a)(2) and (b)(1). Indeed, Section 302 expressly permits a union to receive certain payments in the union's representative capacity. *See* 29 U.S.C. § 186(c)(5)-(8).

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[6] *Cf. A. Terzi Productions, Inc. v. Theatrical Protective Union*, 2 F.Supp.2d 485, 506 (S.D.N.Y. 1998) (Sotomayor, *J.*) ("It is a basic tenet of federal labor law that a union has no right to demand that an employer recognize or bargain collectively with the union unless it has first obtained the majority backing of that employer's employees and been certified as their bargaining representative.").

To the extent Sections 302(a)(2) and (b)(1) generally cover other "things of value," they reasonably should be read as excluding those "things" that a union seeks or receives in its representative capacity for the benefit of the employees whom the union represents or seeks to represent, including the granting and enforcement of valuable contractual commitments from an employer. Collective bargaining agreements, which unions negotiate as employees' exclusive bargaining representatives, plainly fall within this category. Pre-recognition agreements may also reasonably be viewed as excluded from Section 302's coverage, so long as those agreements are negotiated for employees' benefit and not obtained by a union through extortionate conduct.

Here, the Eleventh Circuit's decision presumes that (1) a pre-recognition agreement can have value to a union in its self-interested, institutional capacity rather than solely in its representative capacity, thereby raising the possibility of union self-dealing, and (2) such an agreement can also be the product of union extortion. Recent developments in the labor field show that these presumptions are correct.[7]

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[7] The Third and Fourth Circuits, the only other circuits to address the question presented here, have held that a pre-recognition agreement is not a "thing of value" under Section 302. *See Adcock v. Freightliner, LLC*, 550 F.3d 369, 373-376 (4th Cir. 2008); *Hotel Employees & Rest. Employees Union, Local 57 v. Sage Hospitality*, 390 F.3d 206, 218-219 (3d Cir. 2004). The *Sage* court appeared to misconceive of such agreements as primarily a form of arbitration agreement and refused even to consider whether such agreements can undermine the interests of the employees whom the union seeks to represent. *See* 390 F.3d at 219. The *Adcock* court unreasonably rejected the notion that "access" to employees, including access to an employer's property, can ever have value to a union, contrary to decades of case law

II. OVER THE PAST TWO DECADES, PRE-RECOGNITION AGREEMENTS HAVE BECOME HIGHLY VALUED BY MANY UNIONS.

Union membership has fallen steadily for decades. In 1945, more than a third of non-agricultural workers were union members.[8] In 1983, union membership was at 20.1 percent.[9] By 2012, the rate of union membership had plummeted to 11.3 percent as a whole and within the private sector stood at a meager 6.6 percent.[10] As unions' fortunes have fallen, unions have increasingly turned to pre-recognition agreements -- which bypass traditional means for organizing under the NLRA and provide a somewhat greater likelihood of union success in campaigns – to try to stanch their steep decline.[11]

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recognizing, at least impliedly, the great value that non-employee union organizers place on such access. 550 F.3d at 374. *C.f., e.g., Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *NLRB v. Babcock*, 351 U.S. 105 (1956). The Third and Fourth Circuits' decisions also failed to consider the broader context in which pre-recognition agreements are often demanded by unions, including the substantial efforts and expense that unions undertake to attempt to obtain such agreements. These two decisions holding that a pre-recognition agreement can never be a "thing of value" should be rejected.

[8] Gerald Mayer, "Union Membership Trends in the United States" at CRS-12 (CRS [Congressional Research Service] Report for Congress, August 31, 2004), *available at* http://www.digitalcommons.ilr.cornell.edu/key_workplace/174/.

[9] Bureau of Labor Statistics, Economic News Release, Union Members – 2012 (Jan. 23, 2013), *available at* http://www.bls.gov/news.release/union2.nr0.htm.

[10] *Id.*

[11] *See generally* James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90

A. Traditional campaigns under the NLRA occur on a level playing field.

In a traditional campaign, a union first attempts to collect signed cards from employees designating the union as employees' exclusive collective bargaining representative. This card collection may be conducted in secret without the employer being aware of the organizing drive and without it taking the opportunity to express its own views on the merits of unionizing. If the union obtains signed cards from a majority of employees in a proposed bargaining unit, the union will usually present them to the employer and ask that the employer recognize the union. 29 U.S.C. § 159(a). Ordinarily, an employer will decline to agree to such recognition based on the union-collected cards alone and instead will exercise its right under the NLRA to demand a representation election supervised by the NLRB. 29 U.S.C. § 159(c)(1)(B). During the period leading up that election, an employer will also often exercise its right under Section 8(c) of the NLRA to express its views on unionization and, in many cases, will urge employees to vote against the union. 29 U.S.C. § 158(c). An election then occurs during which "laboratory conditions" are created under the supervision of the NLRB and employees are permitted to vote secretly to express their free choice for or against union representation. *See, e.g., General Shoe Corp.*, 77 NLRB 124, 127 (1948) ("In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees.").

IOWA L. REV. 819, 824-831 (Mar. 2005) (describing the rise of neutrality and card check agreements since the mid-1990s).

B. Pre-recognition agreements often tilt the playing field substantially in unions' favor.

Unions' pre-recognition agreements seek to re-write the ground rules for organizing campaigns in significant ways. These agreements typically consist of some combination of commitments by an employer requiring it to remove itself from the process, including: (1) a pledge of employer neutrality on the issue of unionization (i.e., a waiver of the employer's right to speak non-coercively on the issue of unionization under Section 8(c) of the NLRA and the First Amendment[12]); (2) the obligation to use only card check procedures (i.e., a waiver of the employer's right under the NLRA to seek an NLRB-supervised, secret-ballot election to determine whether a majority of employees support the union); (3) a pledge to provide employee lists to the union so the union may contact employees directly outside the workplace to obtain their signatures on the cards; and (4) a promise to grant the union physical access to the employer's property to solicit employees on-site during their breaks and other non-working hours.[13] In exchange, a union may agree to forego the right to picket or strike and/or pledge not to publicize the labor dispute beyond the scope of organizing.

In short, pre-recognition agreements often represent an employer's capitulation with respect to the

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[12] *Cf. Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 68 (2008) (Section 8(c) of the NLRA both "implements the First Amendment" and manifests a "congressional intent to encourage free debate on issues dividing labor and management").

[13] *See* Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 INDUS. & LAB. REL. REV. 42, 47-48 (Oct. 2001).

means by which it might oppose the union, including giving up the opportunity even to inform employees of the benefits of remaining union free in counterpoint to the other side's unqualifiedly pro-union message.

C. Pre-recognition agreements can serve unions' self-interests rather than the interests of employees.

There is a substantial question whether pre-recognition agreements primarily benefit unions in their institutional, self-interested capacity at the expense of employees. Critics charge that unions' rejection of NLRB secret-ballot elections in favor of card check procedures and mandated employer neutrality undermines employees' interests in making fully informed, free choices as to unionization.[14] In a traditional campaign, employees typically receive information from both the union and the employer regarding the relative merits of unionization, and employees can then register their own opinions anonymously by secret ballot in elections closely supervised by a federal agency to ensure fairness. In stark contrast, card-check campaigns are carried out

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[14] *See, e.g.*, Brudney, *supra* note 11, at 841-844 (recounting hearings in the U.S. House of Representatives in 2002 and 2004 during which scholars, attorneys, employees, and others testified regarding instances of union coercion during card check/neutrality campaigns); Compulsory Union Dues and Corporate Campaigns: Hearings on H.R. 4636 Before the Subcomm. on Workforce Prots. of the House Comm. on Educ. & the Workforce, 107th Cong. 6-7 (2002), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-107hhrg82142/content-detail.html; Comment, *Union Authorization Cards*, 75 YALE L. J. 805 (Apr. 1966) (providing a comprehensive critique of the use of authorization cards in place of secret-ballot elections to determine whether a majority of employees choose union representation).

without governmental supervision or employee protections, often without any perspectives being presented to employees other than the union's, without employees' being allowed to make their decisions anonymously and privately, and with union representatives repeatedly pressing employees for their signatures should they fail to sign the first time, even coming to employees' homes to do so.[15]

Card check procedures create conditions favorable for the coercion of employees in their selection of union representation. Indeed, experience shows that when there is an NLRB-supervised election, it is common for a substantial percentage of employees who had signed union authorization cards at the outset of the campaign to vote against the union once employees are given the privacy of the secret ballot voting booth to do so.[16] In light of such concerns, this Court in *NLRB v.*

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[15] *See, e.g.*, James Sherk, *How Union Card Checks Block Workers' Free Choice*, HERITAGE FOUNDATION *WEBMEMO* NO. 1366 (Feb. 21, 2007), *at* http://www.heritage.org/research/reports/2007/02/how-union-card-checks-block-workers-free-choice.

[16] *See, e.g.*, Comment, *supra* note 14, at 826-827 & 829 (noting that an employee might agree to sign a union authorization card to insure himself against the possibility of possible retaliation by the union should it prevail all the while "planning to vote against the union" by secret ballot and providing data showing a disparity between the percentages of employees who signed union authorization cards and the percentages who ultimately voted in favor of unions in elections); *see also Montgomery Ward & Co. v. NLRB*, 904 F.2d 1156, 1163 (7th Cir. 1990) (Easterbrook, *J.*, concurring) (noting that "we expect to see – and do see – substantial slippage between the cards and the votes in a simon-pure election" and that "[w]hen unions get between 50% and 70% of the cards, they win only 48% of the elections"); *NLRB v. Village IX, Inc.*, 723 F.2d 1360, 1371 (7th Cir. 1983) ("Although the union in this case had a card majority, by itself this has little significance. Workers sometimes sign union authorization cards

Gissel Packing Co., 395 U.S. 575, 602-603 (1969), noted that "secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support," acknowledged the "superiority of the election process," and remarked that the collection of authorization cards is "admittedly inferior to the election process."

Despite legitimate concerns about the diminishment of employees' access to information and right of free choice, unions seek pre-recognition agreements for a simple reason: because they believe they can win recognition in some card-check campaigns where they would otherwise lose an NLRB-supervised, secret ballot election. According to one study published in 2001, unions won 78.2 percent of surveyed campaigns involving pre-recognition agreements mandating employer neutrality and card-check procedures compared with unions' average campaign success rate of only 45.64 percent in NLRB elections between 1983 and 1998.[17] And obviously the more campaigns a union wins, the more dues-paying members it will have.

Within this broader context, it is evident that a pre-recognition agreement can have significant value to a union directly, outside of its representative capacity, as a means to increase the union's size, power, and treasure. A pre-recognition agreement certainly can

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not because they intend to vote for the union in the election but to avoid offending the person who asks them to sign, often a fellow worker, or simply to get the person off their back, since signing commits the worker to nothing . . . ."); *NLRB. v. Gorbea, Perez & Morell, S. En C.*, 300 F.2d 886, 888 (1st Cir. 1962) (noting that "a man might sign a union card as a hedge if it [thus] costs him nothing, and yet on a secret ballot not vote for the union").

[17] Eaton & Kriesky, *supra* note 13, at 51-52.

constitute a thing of value to the union within the meaning of Section 302.

III. PRE-RECOGNITION AGREEMENTS OBTAINED BY UNIONS THROUGH "CORPORATE CAMPAIGNS" CAN BE THE PRODUCTS OF EXTORTION.

> *"Employers may claim that union members are violating laws on secondary boycott, libel, slander, or extortion. . . . [K]eep in mind that the laws are written primarily to protect employers, and that our union might never have been established in the first place if our founders had not used tactics which violated those laws. Union members sometimes must act in the tradition of Dr. Martin Luther King and Mohatma Gandhi and disobey laws which are used to enforce injustice against working people."*
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> Service Employees International Union AFL-CIO, CLC, CONTRACT CAMPAIGN MANUAL, Chapter 3, "Pressuring The Employer," at page 3-47.[18]

The Eleventh Circuit correctly held that a union and employer do not violate Section 302 by merely entering and enforcing pre-recognition agreements. Pet. App. 8. Rather, the creation and enforcement of such agreements "become illegal payments" only "if used as valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer." *Id.*

The Eleventh Circuit's decision to remand the case for the district court to determine why the employer

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[18] Compl., Ex. 8, *Sodexo, Inc. v. Service Employees International Union et al.*, Case No. 1:11-cv-00276 (E.D. Va Mar. 17, 2011), ECF No.1-8.

and union entered the agreement at issue makes sense in light of Respondent Mulhall's well pled allegations in his complaint and unions' actual practices in labor organizing. Recent experience shows that pre-recognition agreements can, in some circumstances, constitute "valuable consideration" that unions seek through extortionate conduct, in particular, as tribute to curtail a union's all-out war against an employer in the form of a "corporate campaign." Lower courts have already held that some of unions' "corporate campaign" tactics may rise to the level of extortion under various state laws and potentially violate RICO.

A. Unions' corporate campaigns threaten harm to employers' businesses to pressure employers to enter pre-recognition agreements.

"Corporate campaigns" are a relatively new approach to organizing that unions have pursued with increasing frequency since the 1990s.[19] The goal of such campaigns frequently is to place pressure on an employer to agree to a pre-recognition agreement such as those described above.[20]

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[19] *See, e.g.*, Charlotte Garden, *Labor Values Are First Amendment Values: Why Union Comprehensive Campaigns are Protected Speech*, 79 FORDHAM L. REV. 2617, 2621-2622 (May 2011); James J. Brudney, *Collateral Conflict: Employer Claims of RICO Extortion Against Union Comprehensive Campaigns*, 83 S. CAL. L. REV. 731, 738-39 (2010); Jarol B. Manheim, *Trends in Union Corporate Campaigns: A Briefing Book* (The U.S. Chamber of Commerce, 2005); Herbert R. Northrup & Charles H. Steen, *Union 'Corporate Campaigns' As Blackmail: The RICO Battle at Bayou Steel*, 22 HARV. J.L. & PUB. POL'Y 771, 782-783 (Summer 1999).

[20] *See, e.g., Executive Mgmt Servs., Inc.*, 355 N.L.R.B. No. 33, 2010 WL 1903993, at *5-6 (May 11, 2010) (describing one union's

There are various definitions of the term "corporate campaign," but as the D.C. Circuit has explained:

> What is clear is that the term encompasses a wide and indefinite range of legal and potentially illegal tactics used by unions to exert pressure on an employer. These tactics may include, but are not limited to, litigation, political appeals, requests that regulatory agencies investigate and pursue employer violations of state or federal law, and negative publicity campaigns aimed at reducing the employer's goodwill with employees, investors, or the general public.

Food Lion, Inc. v. United Food & Commercial Workers Int'l Union, 103 F.3d 1007, 1014 n.9 (D.C. Cir. 1997).

Professor James J. Brudney describes corporate campaigns generally as "union attempts to influence company practices that affect key union goals . . . by generating various forms of extrinsic pressure on the company's top policymakers."[21] He explains that "conflict escalation" plays a central role in these campaigns

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"three cities, one future" campaign in which the union sought to pressure targeted employers in three cities to enter pre-recognition agreements providing that the employers would not oppose the union in act or speech, provide the union a list of the names and addresses of employees, waive any right to file a representation petition with the NLRB, and agree to certain terms for a master collective bargaining agreement); David A. Bego, THE DEVIL AT MY DOORSTEP (2009) (describing in detail a union's multiyear campaign involving picketing, filing of unfair labor practice charges, contacting the employer's clients and prospective clients, creating and coordinating with public interest organizations, and generating ongoing negative publicity in an attempt to force Executive Management Services, Inc. to sign a pre-recognition agreement).

[21] Brudney, *supra* note 19, at 738. *See also* Compulsory Union Dues, *supra* note 14 (statement of Jarol B. Manheim, Professor,

during which unions typically assert "that the company's overall business conduct renders it a corporate outlaw."[22] In their own words, union officials have stated that corporate campaigns are designed to "swarm the target employer from every angle, great and small, with an eye toward inflicting upon the employer the death of a thousand cuts rather than a single blow."[23]

Several features of unions' corporate campaigns are particularly noteworthy. First, such campaigns often do not focus exclusively, or even primarily, on the target employer's labor and employment practices. Rather, such campaigns seek to turn investors, customers, regulators, lenders, other key stakeholders, and/or the public generally against a company on any ground available to the union. To this end, unions may join with non-labor groups and focus on "the concerns of the civil rights, environmental, and consumer protection movements, among others, which sometimes conveys the impression that those organizations—and not the labor union—are the driving force behind the various rallies, press releases and campaign events."[24]

George Washington University) ("One of the most common uses of the corporate campaign is to pressure non-union companies to accept representation of their employees without a secret ballot election.").

[22] Brudney, *supra* note 19, at 738.

[23] Jarol B. Manheim, *Corporate Campaigns: Labor's Tactic of The "Death of a Thousand Cuts"*, CRC [Capital Research Center], Labor Watch (Jan. 2002), *available at* capitalresearch.org/pubs/pdf/x3760036252.pdf (quoting AFL-CIO secretary-treasurer Richard Trumka).

[24] Garden, *supra* note 19, at 2622.

Second, according to the late Wharton School Professor Herbert R. Northrup and attorney Charles H. Steen, the hallmark of many corporate campaigns is "regulatory harassment," a term used by the United Steelworkers of America.[25] Regulatory harassment involves a union's coordinating or making complaints about the target employer to various federal, state, and local authorities responsible for regulating the employer, triggering formal investigative processes. Regulatory harassment "snowballs the agencies' investigative processes with professionally-executed publicity to maximize on as many interlocking fronts as possible the distraction and compliance costs that must be borne by the target company."[26]

Third, corporate-campaign organizing is often distinctly top down rather than bottom up, initiated and run by a union that targets a particular employer for the union's own purposes rather than by an employer's employees who have reached out to the union to support their own organizing efforts.[27] In

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[25] Northrup & Steen, *supra* note 19, at 783 (citing United Steelworkers of America, A Union for the 21st Century 7 (1995)) & 803.

[26] *Id.* at 784.

[27] *See* Joe Crump, *The Pressure is On: Organizing without the NLRB*, 1 LAB. RES. REV. #18, at 35-37 (1991), *available at* http://digitalcommons.ilr.cornell.edu/lrr/vol1/iss18/8 (advising unions to "organize employers, not employees" because "[e]mployees are complex and unpredictable [and] [e]mployers are simple and predictable"). Mr. Crump further explains:

> I don't believe we have the luxury of sitting around and hoping that employees trapped in a 'union free environment' will come knocking on our door looking for a solution to their problems. If organizing is the lifeblood of the labor movement, then we have to create our own reality, by

contrast to traditional organizing efforts, a union's goal in a corporate campaign is often *either* to obtain the employer's agreement to neutrality, card-check, and other pre-recognition concessions *or* to put the employer out-of-business. As one union organizer explained:

> My local, UFCW 951 in Michigan, subscribes to this policy [of not using the NLRB in organizing] by defining successful organizing in one of two ways: either a ratified, signed collective bargaining agreement with a previously non-union employer or a significant curtailment of a non-union operator's business, including shutting the business down. Neither of these outcomes will occur by relying on the NLRB.[28]

Remarkably, a union's driving a non-unionized employer out of business does not benefit the employees of that employer in any way, even though these are the very employees whose interests the union is ostensibly seeking to represent. But destroying non-unionized businesses can benefit the union. The elimination of non-unionized competitors within a marketplace will inevitably aid the targeted employer's unionized competitors, if any, and their employees who are already members of the union. Shutting down non-union businesses within a marketplace therefore solidifies and expands the union's power, influence, and financial foundation irrespective

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> making our own breaks. And that means focusing on employers and making them pay for operating non-union.

Id. at 37-38.

[28] *Id.* at 34.

of the interests of the employees of the targeted employers.[29]

Finally, "[f]or all of these activities [involved in a corporate campaign], the union signals that the campaign need not continue if the company acquiesces to the union's labor relations objectives," i.e, entering a pre-recognition agreement providing for neutrality and card check procedures.[30]

B. Unions' practices during corporate campaigns can cross the line to become extortionate.

Although some union "corporate campaigns" may consist of lawful applications of permissible economic and social pressure, others involve threatened or actual harm to employer property interests, the willful abuse of regulatory and legal processes, and a malicious intent to destroy a business if it fails to enter a pre-recognition agreement or other agreement with the union. When union corporate campaigns cross the line, employers have responded with lawsuits charging unions with extortion, RICO violations, and other state and federal violations. These cases demonstrate the unlawful extremes to which some unions will go in their efforts to exact pre-recognition

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[29] *Id.* at 35 ("After a three-year struggle, the battle with Family Foods is over. Do we represent the employees? No. The company went out of business. . . . A couple of stores are empty, but I am sure that many of their former patrons are now shopping in unionized stores."); *id.* at 42 (one advantage to using corporate campaigns is that *"[y]ou don't have to wait for a 'hot shop' to organize" but rather you "determin[e] what nonunion company is hurting your organized shops and [take] action to protect your members' working conditions"* (emphasis added)).

[30] Brudney, *supra* note 19, at 743-44.

agreements like the one at issue here or similar concessions. These cases show that union conduct in seeking such agreements by way of a corporate campaign can become extortionate within the meaning of state law or RICO. Certainly, if allegations about a union's misconduct in demanding pre-recognition agreements in exchange for calling off a corporate campaign can state claims under these other laws, then the allegations should similarly be sufficient to state a claim for the violation of Section 302, the very purpose of which is to root out union extortion and bribery.[31]

The following cases provide examples of the types of misconduct in which unions may engage during corporate campaigns and which may give rise to claims of extortion or similar claims.

1. *Bayou Steel Corp. v. United Steelworkers of America*

After enduring the first two years of what turned out to be a three-year corporate campaign led by the union, the employer, Bayou Steel Corp., filed a RICO suit against the union on August 10, 1995 in the U.S. District Court for the District of Delaware. *See Bayou Steel Corp. v. United Steelworkers of Am.*, No. 95-496-RRM, 1996 WL 76344, at *1 (D. Del. Oct. 1998).[32]

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[31] Even where a union's misconduct in a particular case would not satisfy the technical requirements for making out an extortion claim under state law or RICO, the misconduct may nevertheless implicate Section 302's purpose of prohibiting extortion-like behavior that undermines the integrity of the collective bargaining process. *Cf. Arroyo*, 359 U.S. at 425-26.

[32] Although the union's "corporate campaign" against Bayou Steel focused on obtaining a collective bargaining agreement rather than a pre-recognition agreement, Northrup & Steen,

According to the employer's allegations, the union's corporate campaign consisted of, among other things:

- inundating federal and state governmental agencies with complaints about the employer's alleged environmental practices and regulatory non-compliance, which complaints in turn served as the basis for union press releases attacking the company and creating negative publicity;
- interfering with the company's efforts to refinance its mortgage bonds by notifying the Securities and Exchange Commission of the various governmental agency investigations that had been instigated by the union;
- dissuading potential investors from investing in the company (e.g., by placing a tombstone advertisement in the Wall Street Journal relating to the company's financial status);
- erecting a billboard with an unflattering photograph of the company's president near his home;
- initiating protest parades in the president's neighborhood and videotaping his family as they came and left their home; and
- engaging in the same conduct regarding various members of the company's Board of Directors.[33]

Bayou Steel's suit against the union contended that the union was "engaging in a 'Corporate Campaign' of

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supra note 19, at 794, the case illustrates the potentially extortionate quality of such campaigns.

[33] *See* Northrup & Steen, *supra* note 19, at 787-790 & 829.

harassment and violence as a result of failed labor negotiations between plaintiff and defendants, with the intention of taking over or destroying plaintiff." *Bayou Steel Corp.*, 1996 WL 76344, at *1. The employer alleged that the union's conduct violated RICO and state tort laws, among others. The district court denied the union's motion to dismiss the RICO and state tort claims, *id.*, and the parties settled the case at the summary judgment stage.[34]

2. *Food Lion Inc. v. UFCW*

The UFCW waged a series of attacks on a non-unionized grocery store chain as part of a larger effort by the union to eliminate competition.[35] According to one academic commentator, as part of this campaign, the union:

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[34] Northrup & Steen, *supra* note 19, at 773

[35] *See Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 887 F.Supp. 811, 814 (M.D.N.C. 1995) ("The UFCW has been trying unsuccessfully to organize Food Lion employees for more than a decade. The UFCW has publicly acknowledged that it has been conducting an intense 'corporate campaign' with the stated goal of unionizing Food Lion or putting it out of business. The UFCW has instigated administrative or legislative investigations by various governmental authorities by alleging violations of law or regulations on the part of Food Lion. In addition, it has financially supported litigation against Food Lion, and has courted and utilized the media to get widespread publicity for its charges."); *see also* Thomas J. DiLorenzo, *Labor Unions & 'Consumers United with Employees': The Corporate Campaign Against Food Lion*, Organization Trends (Capital Research Center, November 1995); Herbert R. Northrup & Augustus T. White, *Construction Union Use of Environmental Regulation to Win Jobs: Cases, Impact, and Legal Challenges*, 19 HARV. J.L. & PUB. POL'Y 55, 107-109 (Fall 1995).

- created a surrogate entity called "Consumers United With Employees" ("CUE"), described as an association of consumer, labor, religious and civil liberties organizations;[36]
- engineered and planted a media story—culminating in an ABC PrimeTime Live broadcast on November 5, 1992—which claimed that the employer's stores routinely sold rotten fish and ham and covered up the spoilage by bathing the meats in Clorox;[37] and
- used other tactics that included issuing a press release regarding an alleged "independent" investigation in which it was "discovered" the employer allegedly was selling outdated infant formula at its stores.[38]

In addition, the employer claimed that the union "exploited the discovery process in certain collateral litigation to gain irrelevant information about Food Lion's policies and structure."[39] The employer alleged that the union then improperly used this information to file additional charges, disrupt management, and generate bad publicity to aid in the union's organizational efforts.[40] Ultimately, in February 1993, the employer sued the union, claiming that the union's collateral use of litigation constituted an abuse of process.[41] The employer's claim, as amended, survived

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[36] DiLorenzo, *supra* note 35, at 4.

[37] *Id.* at 3.

[38] *Id.* at 4.

[39] Northrup & White, *supra* note 35, at 108.

[40] *Id.*

[41] *Id.*; *see also Travelers Indem. Co. v. United Food & Commercial Workers Int'l Union*, 770 A.2d 978, 983-984 (D.C. 2001)

the union's motion to dismiss.[42] According to a filing with the Securities and Exchange Commission, the case eventually settled, with the union agreeing to discontinue its corporate campaign against the employer.[43]

3. *Smithfield Foods, Inc. v. UFCW*

In September 2005, after more than a decade trying unsuccessfully to organize an employer's hourly workers at a pork processing plant in North Carolina, a union launched a corporate campaign against the employer with the goal of obtaining the employer's "voluntary" recognition of the union. The employer filed an action in late 2007 in the Eastern District of Virginia alleging RICO violations by the union and state law claims for extortion arising from the union's misconduct during the campaign. The complaint alleged in relevant part that the union:

- repeatedly published false, misleading, baseless, negative, and damaging information about the employer to third parties, including the company's customers;[44]
- released a report in print to the public entitled: "Packaged With Abuse: Safety and Health

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(generally describing the employer's lawsuit and claims against the union).

[42] Northrup & White, *supre* note 35, at 109 (citing Order, *Food Lion v. United Food & Commercial Workers Int'l Union*, No. 6:93-0582-LAJ (D.S.C. June 24, 2008).)

[43] Paul Batista, CIV. RICO PRAC. MANUAL, Form 2-B ("Model Civil RICO Complaint No. 4") (Aspen Publishers, 2013).

[44] 1st Am. Compl. ¶ 3, *Smithfield Foods Inc. v. United Food & Commercial Workers Int'l Union et al.*, Civil Action No. 3:07CV641 (E.D. Va. Feb 4, 2008), ECF No. 52.

Conditions at Smithfield Packing's Tar Heel Plant" that contained false accusations;[45]

- sponsored and initiated protests at the locations of the employer's largest customers and even at the homes of officials of those customers;[46]
- solicited support for the protests, by publishing in print and on the internet false information about the Company, including in a document entitled "There's Blood on Smithfield Products" that included false accusations that the employer used "violence, threats and intimidation against workers," was a dangerous workplace, "routinely fire[d] injured workers," and "stir[red] racial tensions"[47]
- lobbied various public bodies to pass resolutions "condemning Smithfield and banning the sale of its products;"[48]
- sent letters to financial analysts inviting them to view the union's website attacking the company and containing false information about it;[49]
- wrongfully interfered with the employer's shareholder meetings;[50]
- wrongfully caused an environmental commission to deny the employer's application to

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[45] *Id.* ¶ 88.

[46] *Id.* ¶ 97.

[47] *Id.* ¶ 99.

[48] *Id.* ¶ 141-154.

[49] *Id.* ¶ 155-158.

[50] *Id.* ¶ 159-167.

renew and expand its National Pollutant Discharge Elimination System permit;[51] and

- filed numerous frivolous and objectively baseless regulatory claims.[52]

Based on these allegations, the employer claimed that the union had engaged in extortion under North Carolina and Virginia law and violated RICO. The union moved to dismiss, contending, among other things, that the pre-recognition agreements that it sought by way of its corporate campaign did not constitute valuable property that could be extorted. The district court disagreed and denied the motion. *Smithfield Foods, Inc. v. United Food & Commercial Workers Int'l Union*, 633 F.Supp.2d 214, 232 (E.D. Va. 2008). The district court found:

> [T]he right to recognize (or not) a union as bargaining representative is among the most valuable and important of rights possessed by business owners. The very existence of the Corporate Campaign concept is founded on the recognition that the exercise of that right is of great import and of great consequence. [T]he right of voluntary recognition cannot, standing alone, be bought or sold or exercised by a third party. That certainly does not mean . . . that the right is not valuable . . . .

Id. at 224. Accordingly, the court held that "[b]ecause the Complaint adequately alleges that the Defendants are attempting to extort from Smithfield . . . its right to refrain from recognizing unions, the Complaint

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[51] *Id.* ¶ 168.

[52] *Id.* ¶ 168-188.

adequately alleges that the Defendants have committed predicate acts of extortion." *Id.* at 225.

In October 2008, the district court also denied the union's motion for summary judgment. *Smithfield Foods, Inc. v. United Food & Commercial Workers Int'l Union*, 585 F. Supp.2d 789 (E.D. Va. 2008). The court held that the employer had "presented sufficient evidence for a jury to conclude that the Defendants acted with a 'wrongful purpose' (i.e., wrongful means) through their corporate campaign, namely, that the campaign sought to force [the employer] to give up valuable property rights in recognizing the Union and agreeing to a first contract." *Id.* at 802. Shortly after the district court's decision, the union and employer entered a settlement agreement.[53]

4. *Sodexo Inc. v. SEIU*

In an effort to represent more than 80,000 Sodexo employees, the SEIU demanded that Sodexo allow the union to unionize as many of its employees as the union desired or else be subject to "perpetual assault."[54] When the company did not accede, the union launched a corporate campaign that the employer alleged included, among other things:

- union supporters' infiltrating Sodexo-catered events and throwing plastic cockroaches onto food being served at those events;[55]

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[53] Settlement Agreement, *Smithfield Foods, Inc. v. United Food & Commercial Workers Int'l Union et al.*, Civil Action No. 3:07CV641 (E.D. Va. Oct 31, 2008), ECF No. 295.

[54] Compl. ¶¶ 2, 10 & 138-58, *Sodexo, Inc. v. Service Employees Int'l Union et al.*, Civil Action No. 1:11-cv-00276 (E.D. Va. Mar. 17, 2011), ECF Nos. 1 & 1-1.

[55] *Id.* ¶¶ 261-62.

- intruding into Sodexo's computer network and embedding internet links that lead to the Union's own, anti-Sodexo propaganda;[56]
- staging disruptive protests and intentionally being arrested in order to maximize media coverage of their attacks;[57]
- sneaking into hospitals and distributing bogus "surveys" to patients asking them whether the food served there by Sodexo contained bugs, rat droppings, mold and flies;[58] and,
- threatening individual Sodexo employees and distributing "Wanted" posters of Sodexo managers.[59]

SEIU indicated it would stop the corporate campaign only if Sodexo capitulated to the union's demands, which included, among other things: (1) foregoing an NLRB-supervised secret ballot election and entering into a "neutrality" agreement requiring Sodexo to remain silent on the issue of unionization during the campaign; (2) agreeing to allow the Union into Sodexo's places of business at any time of their choosing to say whatever they wanted to Sodexo employees; and (3) agreeing to predetermined collective bargaining terms.[60]

In March 2011, after having endured more than a year of the union's corporate campaign, Sodexo filed a 125-page complaint in the Eastern District of Virginia

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[56] *Id.* ¶¶ 264-67.

[57] *Id.* ¶¶ 193, 199 & 246-51.

[58] *Id.* ¶¶ 225-26.

[59] *Id.* ¶¶ 202(a).

[60] *Id.* ¶¶ 85, 129.

alleging, among other things, RICO violations. The union moved to dismiss the complaint, contending, among other things, that the allegations failed to constitute "attempted extortion" under RICO.[61] The district court disagreed and denied the motion.[62] In September 2011, prior to the conclusion of discovery, the parties reached a settlement.[63]

C. The Eleventh Circuit's decision to remand is consistent with the developing law governing unions' new campaign tactics.

Some pre-recognition agreements between employers and unions are truly voluntary, represent cooperative efforts to set mutually acceptable ground rules for organizing campaigns, and are not subject to Section 302. Here, however, the Eleventh Circuit's decision to deny the union's motion to dismiss and to remand the case to the district court to determine whether the agreement at issue involved extortionate conduct is the right one in light of the changing landscape of union organizing, as the above-referenced cases demonstrate.[64] When a union that does not

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[61] Mem. P. & A. Supp. Defs.' Mot. Dismiss at 1 – 2, *Sodexo, Inc. v. Service Employees Int'l Union et al.*, Civil Action No. 1:11-cv-00276 (E.D. Va. June 6, 2011), ECF No. 28.

[62] Order, *Sodexo, Inc. v. Service Employees Int'l Union et al.*, Civil Action No. 1:11-cv-00276 (E.D. Va. July 26, 2011), ECF No. 52.

[63] Stipulation of Dismissal and attached letter, *Sodexo, Inc. v. Service Employees Int'l Union et al.*, Civil Action No. 1:11-cv-00276 (E.D. Va. Sept 19, 2011), ECF Nos. 77 & 77-1.

[64] *See also* U.S. Amicus Br. 15 – 16 (May 24, 2013) (opposing the petition for a writ of certiorari and the conditional cross-petition for a writ of certiorari on ground that it "would be

represent an employer's employees targets that employer with a corporate campaign to compel the employer to grant the union contractually enforceable waivers of the employer's rights to oppose the union's organizing efforts, the union is clearly demanding a thing of great value to the union itself. Whether such campaigns cross the line to become extortionate, and whether the pre-recognition agreements that unions exact as a result of such campaigns violate Section 302 and are unenforceable, will depend on the particular facts of the case, as the Eleventh Circuit here correctly determined.

CONCLUSION

For all of the reasons set forth above, a pre-recognition agreement granting a union that does not represent the employer's employees the contractual right to enforce the employer's waiver of its property, speech, and statutory rights, which the employer might otherwise use to oppose the union, can constitute a "thing of value" under Sections 302(a)(2) and (b)(1). The Court should affirm the judgment of the court of appeals.

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beneficial to allow the courts to consider the application of Section 302 to different types of promises in voluntary recognition agreements" and that "[c]onsideration of agreements that contain different terms could illuminate whether any type of agreement would as a general matter implicate the policy concerns underlying Section 302").

Respectfully submitted,

HAROLD P. COXSON
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
1909 K Street
Suite 1000
Washington, D.C. 20006
(202) 887-0855
hal.coxson@odnss.com

CHRISTOPHER C. MURRAY
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
111 Monument Circle
Suite 4600
Indianapolis, IN 46204
(317) 916-1300
christopher.murray@odnss.com

ARTHUR B. SMITH, JR.
Counsel of Record
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
155 North Wacker Drive
Suite 4300
Chicago, IL 60606
(312) 807-3619
arthur.smith@odnss.com

CHRISTOPHER R. COXSON
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
10 Madison Avenue
Suite 400
Morristown, NJ 07960
(973) 656-1600
christopher.coxson@odnss.com

Counsel for Amicus Curiae

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

UNITE HERE LOCAL 355,
Petitioner,

v.

MARTIN MULHALL, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR *AMICUS CURIAE* THE NATIONAL ACADEMY OF ARBITRATORS IN SUPPORT OF THE PETITIONER

Of Counsel
James Oldham,
NAA President
GEORGETOWN LAW
600 New Jersey Ave., NW
Washington, D.C. 20001

Matthew W. Finkin
Counsel of Record
THE UNIVERSITY OF ILLINOIS
COLLEGE OF LAW
504 East Pennsylvania Ave.
Champaign, IL 61820
(217) 333-3884
mfinkin@illinois.edu

Barry Winograd
1999 Harrison Street,
Suite 1400
Oakland, CA 94612

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF *AMICUS CURIAE*

The National Academy of Arbitrators was founded in 1947 "to foster the highest standards of integrity, competence, honor and character among those engaged in the arbitration of industrial disputes on a professional basis," to adopt and secure adherence to canons of professional ethics, and to promote the study and understanding of the arbitration of industrial disputes.[1] Gladys Gruenberg, Joyce Najita & Dennis Nolan, THE NATIONAL ACADEMY OF ARBITRATORS: FIFTY YEARS IN THE WORLD OF WORK 26 (1997). As the historians of the Academy observe, the Academy has been "a primary force in shaping American labor arbitration." *Id.*

The Academy's stringent rules assure that only the most active and well-respected practitioners are elected to membership along with scholars specially selected for significant contributions to the understanding of labor law and labor relations. Members are prohibited from serving as advocates or consultants in labor relations, from being associated with firms that perform those functions, and from serving as expert witnesses on behalf of labor or management. Currently, the Academy has approximately 600 U.S. and Canadian members.

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[1] Rule 37.6 statement: Counsel for *amicus* are the sole authors of this brief. No person or entity other than the National Academy of Arbitrators has made any monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

In keeping with its educational mission, the Academy has appeared before this Court as *amicus curiae* in cases concerning the law of arbitration under collective agreements—*see, e.g.*, *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986), *Eastern Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57 (2000), and *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504 (2001)—as well as in cases concerning the law of the arbitration of individual statutory claims. *See, e.g.*, *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), and *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009).

This case presents a question of whether a contract between a company and a union under which the parties structure their relationship in anticipation of potential union recognition and collective bargaining implicates § 302 of the Labor Management Relations Act, 29 U.S.C. § 186. The contract includes arbitration as an integral component of the system it creates. The system encompasses both a pre-recognitional phase and structures the parties' relationship and obligations should the union secure majority employee support as the exclusive bargaining representative. The Academy's members have considerable experience under such contractual pre-recognition governance systems. In fact, the arbitrators who served under the contract presented here are Academy members; one is a former president of the Academy. The Academy submits that it is particularly well situated to advise the Court about the role of neutral umpireship in an analysis of the § 302 issue.

SUMMARY OF ARGUMENT

The Question Presented is whether an employer's participation in a regime of labor-management relations that structures the parties' relationship, in anticipation of potential union recognition, "pays" or "delivers" a "thing of value" to the union in violation of criminal law. The court below, as have the other courts, focused solely on the rules contained in the agreement. No judicial attention has been devoted to the role of arbitration as a component of the negotiated system as a whole. Once the role of arbitration is considered, it is apparent that what is "paid" or "delivered"—note the awkward statutory usage—is a system of industrial self-government in which arbitration plays a key role in overseeing the meaning, including the lawfulness, of the system. Such a pre-recognitional governance system is no more encompassed by § 302 than is the system of industrial self-government created by a collective bargaining agreement given legal effect through § 301 of the Labor Management Relations Act, 29 U.S.C. § 185.

In fact, it is quite impossible to distinguish a pre-recognition exchange of terms, of union access in return for labor peace subject to arbitral oversight, from a post-recognition exchange of terms, of recognition of union and management rights in return for labor peace subject to arbitral oversight. To accept the applicability of § 302 to the former is to extend the potential applicability of criminal law to the latter. Both would be antithetical to well-established labor law and policy.

ARGUMENT

I. A Contract Governed by § 301 of the Labor Management Relations Act May Submit the Lawfulness and Scope of an Employer's Obligations to Arbitration Without Fear of Criminal Sanction.

The Court is presented with an executory contract between an employer engaged in interstate commerce and a union representing employees in that industry. The employer has promised to afford the union access to the employees the union wishes to represent; has promised not to oppose the union in its effort to secure majority support—a promise of non-belligerence; and has promised to recognize the union upon a determination of majority support made by a neutral arbiter. In return, the union has agreed to refrain from coercion or threats of employees, and to refrain from the use of lawful means to bring economic pressure on the employer to secure recognition as an exclusive bargaining representative—a promise of labor peace. The union also agreed to fundamental management rights, including management's right to judge the suitability of applicants for hire, and a ban on union bias in job referrals.

This structure of autonomous self-government by private parties in the matter of representation is made subject to arbitration, available to both sides, and not only by a neutral, but by one of experience and integrity. The arbitrator is charged with deciding any dispute arising under the system, including a dispute on whether the system itself is lawful. The arbitrator's decision is final and binding. There is no severability clause: the system of

arbitration encompassed by the contract is part-and-parcel, an inextricable component of the self-governing system the contract creates. And, in fact, arbitration was invoked in this case. In one proceeding, the employer contested whether the entire system was lawful under § 302. The arbitrator, a noted figure in the profession, analyzed the evidence and the law, and held the system lawful. The federal district court enforced his award. The employer did not appeal. Now Respondent, in his complaint, objects to the arbitrator's decision and seeks to enjoin future arbitration proceedings.

Amicus submits that a pre-recognitional contractual regime that accords arbitration an integral role is exempt from criminal scrutiny under § 302: certainly, as here, after the lawfulness of the contract has been sustained by an arbitrator under § 302(c)(2); but also where arbitration is available though not invoked. The reason is simple: The system of self-government created by the contract, which features and is contingent upon arbitration as a central component of the system, is not—and cannot be—a "thing of value" "paid" or "delivered" to a labor organization within the meaning of § 302.

A. The Instant Contract is Governed by § 301 of the Labor Management Relations Act.

Section 301 of the Labor Management Relations Act confers jurisdiction on federal district courts for a claim that a contract made between an employer and a labor organization has been violated. The Court has held that such a contract need not be a collective bargaining agreement made with a majority representative setting terms and conditions of

employment. It may be a strike settlement agreement made with a union that has lost a majority; it may even be an agreement made with a non-majority representative for its members. *Retail Clerks Int'l Ass'n v. Lion Dry Goods, Inc.*, 369 U.S. 17, 28-29 (1962). The Court explained how that is so in the context of a strike settlement, but in terms that strongly resonate here:

> It is enough that this is clearly an agreement between employer and labor organizations significant to the maintenance of labor peace between them. It came into being as a means satisfactory to both sides for terminating a protracted strike and labor dispute. Its terms affect the working conditions of the employees of both respondents. It effected the end of picketing and resort by the labor organizations to other economic weapons, and restored strikers to their jobs. It resolved a controversy arising out of, and importantly and directly affecting, the employment relationship. Plainly it falls within § 301 (a). "[F]ederal courts should enforce these agreements on behalf of or against labor organizations and...industrial peace can be best obtained only in that way."

Id. at 28 (quoting *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455 (1957).

Lincoln Mills held that § 301 commissioned the courts to create a body of labor-management relations law flowing from agreements made subject to that section. The role of arbitration under § 301 was charted in the *Steelworkers Trilogy* in 1960—*United Steelworkers of America v. American Mtg.*

Co., 363 U.S. 564 (1960), *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960), *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960)—and has remained a pillar of federal labor policy ever since. In a nutshell, it has long been national labor policy under § 301 to accord substantial deference to the system of industrial self-government and to arbitration created by agreements between management and labor, including the resolution by arbitrators of representation issues arising in contractual disputes. *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261 (1964).

To be sure, the instant "neutrality" agreement is not a collective bargaining agreement; it does not detail the employees' terms and conditions of employment, though it provides for that eventuality. The agreement deals principally with the pre-conditions for the achievement of a collective bargaining agreement; but it also details how the parties will deal with one another going forward—a promise of non-belligerence in return for a promise of labor peace—and vests umpireship of the regime in a jointly selected neutral arbitrator. The agreement draws sustenance from the teaching in *Lincoln Mills*, the *Trilogy*, and *Lion Dry Goods*, and which the courts have faithfully followed for decades, including application to pre-recognition neutrality agreements, to require arbitration and to confirm awards. *See, e.g., Hotel Emps. & Rest. Emps. Union, Local 57 v. Sage Hospitality Res., LLC*, 390 F.3d 206, 209-210, 219 (3rd Cir. 2004); *AK Steel v. USW*, 163 F.3d 403, 407-409 (6th Cir. 1998); *Hotel & Rest. Emps. Union Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561, 566-

567 (2d Cir. 1993); *Patterson v. Heartland Indus. Partners, LLP*, 428 F. Supp. 2d 714, 717 (N.D. Ohio 2006). Here, too, the arbitrator is part-and-parcel of a system of industrial self-government[2] that can apply statutory law in the forum agreed upon by labor and management. *Cf. 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009) (employment discrimination statutory claims); *Mitsubishi v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). The question, then, is whether § 302 can nullify a contract governed by § 301, by relying on the very terms to which § 301 gives full effect, terms that demonstrate a mutual effort to secure peaceful

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[2] The relevance of this feature of the U.S. law of industrial relations under § 301 is illuminated by the observations of an astute Canadian scholar:

> Labour law has always been distinguishable by the extent to which it permits and encourages employers and unions to develop their own standards and norms, most notably through the mechanisms of collective bargaining and grievance arbitration. The state[]...uses regulation to establish the framework that enables these private norm-producing activities to function effectively, but leaves it to the parties to define most of the substantive rules of employment....*The state plays a similar role in relation to neutrality agreements*. These agreements are bargained privately, but within specific parameters defined by labour law....The state establishes an environment in which neutrality agreements can operate and make industrial relations sense, yet leaves it to the parties to decide whether such an agreement will be useful to them and, if so, what its content and form should be.

David Doorey, *Neutrality Agreements: Bargaining for Representation Rights in the Shadow of the State*, 13 Can. Lab. & Emp. L. J. 41 (2006) (footnote omitted) (emphasis added).

relations in the matter of employee representation and which provide for arbitration as part of that self-governing system. An arbitrator, in giving effect to an agreement consonant with the Court's teachings on the meaning of § 301, cannot be "paying" or "delivering" something prohibited by § 302.

B. Section 302(a)(2) Does Not Apply to This Agreement.

Analysis of the relationship of § 302 to § 301, and the texture of law developed under it, is aided by three considerations. First, § 302 exempts the "payment or delivery of any money or other thing of value" in satisfaction of an arbitral award. Second, § 302 defers elsewhere to self-governing umpireship. Third, as a criminal statute, § 302 should be read closely to conform to what the legislature intended in which the fact of deference to a system of industrial self-governance should play a critical role.

1. Section 302(c)(2) Excludes Arbitral Awards From the Reach of § 302(a)(2).

The plaintiff's theory is that the performance of the promises management made in the neutrality-recognition agreement "paid" or "delivered" a "thing of value" to the union. But the employer also agreed to a system of arbitral umpireship within which the employer could—and did—challenge the lawfulness of its promises under § 302. There is no dispute that the arbitrator had the power to consider the claim, just as the district court directed when the employer resisted arbitration. The employer presented the claim. The arbitrator deliberated and was not persuaded. He concluded that the agreement was an

arm's length bargain, without any corruption underlying the parties' action—answering the exact question concerning the intent of the parties that the Eleventh Circuit has posed on remand. The arbitrator's award directed that the contract be performed; and the district court confirmed the award. No appeal was taken. It follows that all further challenge is barred according to the statute, absent a showing of fraud or duress.[3]

The fact that the plaintiff below was not a party to the arbitration is beside the point. The plaintiff's claim is brought under § 302, but, by its plain language, § 302 exempts—"shall not be applicable to"—the payment or delivery of anything of value whose payment or delivery has been arbitrated and awarded. The interplay between this exemption and the other provisions of § 302 was explored by the court in *Humility of Mary Health Partners v. Local 377, Teamsters*, 296 F. Supp. 2d 840, 845-848 (N.D. Ohio 2003) (reviewing authority). As long as the arbitrator resolved the dispute by interpreting the agreement in accord with the teachings of this Court, the award exempts what it orders from the reach of § 302. *Id. See also Washington Post v. Washington-Baltimore Newspaper Guild Local 35*, 787 F.2d 604, 606-607 (D.C. Cir. 1986) and *Paperworkers v. Misco, Inc.*, 484 U.S. 29 (1987); *cf. Labor Relations Div. v. Teamsters Local 379*, 156 F.3d 13 (1st Cir. 1998)

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[3] Section 302(c)(2) provides:

The provision of this section [302] shall not be applicable...(2) with respect to the...delivery of any...thing of value in satisfaction of a[n]...award of an arbitrator or impartial chairman....in the absence of fraud or duress.

(award that does not interpret the parties' contract in accord with the Court's teaching does not bar the application of § 302). In this case, the award was judicially affirmed. What it awarded, enforcing the agreement, is therefore exempt from § 302 challenge. That is the plain meaning of the Act.

This exemption provides more than a shield to protect the parties; it bars reliance on § 302 as the basis for a collateral attack. This has practical significance in view of the fact that research shows the vast majority of neutrality agreements provide for arbitration to resolve disputes.[4]

In sum, assuming *arguendo* that the company's performance of the contract pays or delivers something of value within the meaning of § 302—which is the plaintiff's theory, but which *amicus* believes to be untenable—it cannot now be challenged under § 302 for the simple reason that § 302, by its terms, does not "apply."[5] Assuming further that the executory promise remains a justiciable question for this Court's attention, *amicus* submits that the better reading is to hold § 302 inapplicable to pre-recognition agreements that include arbitral oversight whether resorted to or not. To rule otherwise would frustrate the mandate of § 301 as interpreted in *Lincoln Mills*.

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[4] Adrienne Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 Indus. & Lab. Rel. Rev. 42, 47-48 (2001).

[5] The same provision exempts the payment or delivery of a thing of value ordered by a court. Thus it pays to stress for purposes here that Congress accorded arbitration an equal status.

2. A Neutrality-Recognition Contract That Provides for Arbitration as Part of its System of Governance Does Not "Pay," "Lend," or "Deliver" a "Thing of Value" Within the Meaning of § 302.

The principal question here is not whether unions value neutrality-recognition agreements, but whether an employer who enters into a neutrality-recognition agreement with a union is making a "pay[ment]" or "deliver[y]" to the union of any "money or other thing of value" as those terms are used in § 302. It is important to note that section 302 criminalizes not just "demand[s]" by unions presented to employers, but "request[s]" as well. The test under § 302(b) for determining whether a request by a union for an agreement from an employer, such as a neutrality-recognition agreement, is a criminal "request" cannot be whether the union "values" what it is requesting. If the test were one that turned on value to the union of what is requested, then every request by a union made on any subject—wages, benefits, and cause for discharge, to name just a few—would be deemed a request for a "payment" or "delivery" of a "thing of value" to the union and would therefore fall within the basic criminal proscription of § 302(b). *Amicus* submits that an employer that enters into a neutrality agreement subject to arbitral oversight is not making any statutorily prohibited payment or delivery.

At the threshold, it is important to stress that § 302 is a criminal law. Those who must guide their conduct on pain of criminal sanction should have fair

warning of what is proscribed. *Babitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 704 n. 18 (1995) (citing *United States v. Bass*, 404 U.S. 336, 348 (1971)); *United States v. Lanier*, 520 U.S. 259, 226 (1997). *See also Leocal v. Ashcroft*, 543 U.S. 1, 11 n. 11 (2004) (on the construction of laws with both criminal and civil effect). Criminal law is a blunt instrument. Even if well intended by the prosecutor, or by the civil plaintiff as the alter ego in this proceeding, the criminal law should not venture into matters not clearly commanded by the text. This is especially so where another legal tool, as here, speaks more specifically to the issue of undue managerial influence on unions and where the power to enforce that law is vested in an expert administrative agency rather than a criminal jury.

Under Section 8(a)(2) of the National Labor Relations Act, it is an unfair labor practice for an employer to "contribute financial or other support" to a labor organization. 29 U.S.C. § 158(a)(2). *A fortiori*, the payment or delivery of anything of value to a union in violation of § 302 would constitute an unlawful contribution of financial or other support to the union in violation of § 8(a)(2). And, *per contra*, forms of financial or other support that constitute permissible labor-management cooperation not violative of section 8(a)(2) could not violate § 302. *See, e.g., NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849 (5th Cir. 1986). *See generally*, Robert Gorman & Matthew Finkin, LABOR LAW ANALYSIS AND ADVOCACY, § 9.6 (2013) ("Cooperation Distinguished From Support"). Any person can file a charge of unfair labor practice with the National Labor

Relations Board; he or she need not be a party to the agreement or even claim to be personally aggrieved. Consequently, a remedy for impermissible financial or other support by management to a union already exists without resort to criminal law.

As the above demonstrates, the Board has long evaluated claims of unlawful employer support. In that role, the Board has sustained, with recent judicial approval, a pre-recognitional system similar to the one challenged here as not constituting impermissible support prohibited by the Labor Management Relations Act. *Montague v. NLRB*, 698 F.3d 307 (6th Cir. 2012) *enfg Dana Corp.*, 356 NLRB No. 49 (2010). The Eleventh Circuit in this case has opened an avenue that disrupts the role of the administrative agency and disrupts settled law. Section 302, since its passage over 65 years ago, has never been applied in this fashion. The historical record argues powerfully against a novel extension now.

A further problem with § 302 is that it is inexact, to say the least. In some situations, the language is "precise." *Arroyo v. United States*, 359 U.S. 419, 423 (1959). But no precision attaches to the general notion of what a "thing of value" must be, the "payment" or "delivery" of which is made a crime. As a leading academic observed shortly after the Taft-Hartley Act took effect, "just what...section (302) meant to achieve is hard to tell." Charles O. Gregory, Labor and the Law 451 (1949 rev. ed.).

> It is possible, of course, that Congress was not able to describe in positive terms just what it wanted to make unlawful with respect to such payments. Perhaps it got so

> worked up about reported shakedowns of all sorts by union officials that it thought it easier to take a dismal view of all cash transactions between employers and unions, except those enumerated.

Id. at 452. When § 302 was amended in 1969, the House Report tersely summarized its purpose: "This prohibition was enacted to prevent bribery, extortion, shakedowns, and other corrupt practices." H.R. Rep. No. 286, 91st Cong., 1st Sess. *reprinted in* 1 U.S. Code Cong. & Admin. News at 1159-1160 (1969).

The Court is not presented here with bribery, extortion, shakedown, graft, or kickbacks. The Court is presented with a structured labor-management relationship in which umpireship by an experienced neutral selected by the parties plays an integral role. It is impossible to conceive that Congress would have had this in mind as within the compass of § 302.

Guidance can be drawn from two other sources. The first, as the Court has instructed, is the "entire text of § 302." *United States v. Ryan*, 350 U.S. 299, 305 (1956). It is concerned with something that can be paid, lent, or delivered. *Amicus* submits that an entire system of labor-management relations subject to arbitral umpireship is simply not such a thing.

The Labor Management Relations Act included sections 301 and 302. The former embraced the enforcement of agreements for labor arbitration which had matured into a unique feature of American industrial relations. R.W. Fleming, THE LABOR ARBITRATION PROCESS Ch. 1 (1967) ("History and Growth"). Not surprisingly, then, when in the latter, Congress addressed the specific wrong of

money payments to unions, it exempted payments to union-sponsored trust funds which, at first blush, as a cash payment to a union outright, would seem to come under § 302. But Congress exempted such cash payments when two conditions were met—that the funds be jointly administered and that any dispute would be resolved by an "impartial umpire." § 302(c)(5)(B).[6] In other words, Congress decided that even where the payment of money to a union is present, it is exempt from, and cannot be considered corrupt under, § 302(a)(2) when the payment is subject to labor-management cooperation and neutral arbitral umpireship. It follows *a fortiori* that other systems of labor-management cooperation subject to arbitral oversight that do not involve the payment, lending, or delivery of money or anything like money were not and cannot be a subject of that section's concern.

The second source of guidance looks to labor arbitration under § 301 and the deference accorded by national labor policy. It is critical to stress that the challenge presented here is not to a specific payment, gift, or loan to a union agent or officer, but rather to an entire system of pre-recognition governance, an exchange of mutual management-

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[6] This exemption is noted by the Court in *Arroyo v. United States*, *supra*, at 425-427. It is discussed at length by Harry Mills & Emily Clark Brown, FROM THE WAGNER ACT TO TAFT-HARTLEY 564-568 (1950), and by Charles O. Gregory, LABOR AND THE LAW, *supra* at 452 ("This last part dealing with payments for trust funds is subject to a proviso too complicated to discuss, except to remark that Congress was certainly worried about any of the dough sticking to the fingers of the union boys!").

union obligations subject to arbitral oversight of non-belligerence and labor peace. *See Retail Clerks Int'l Ass'n v. Lion Dry Goods, Inc., supra. Cf. Montague v. NLRB, supra*; *Verizon Information Sys.*, 355 NLRB 558 (2001). When § 302(a)(2) is examined through the lens of the rich body of law and experience under § 301, the conclusion must be that a contract of this nature cannot be a criminal act proscribed by § 302. To reason otherwise would permit any employee opposed to unionization to claim, as the circuit court stated in its first decision, that the facilitating of organization under the neutrality agreement works a wrong as it might well "substantially increase the likelihood that Mulhall will be unionized against his will." *Mulhall v. United Here Local* 355, 618 F.3d 1279, 1289 (11th Cir. 2010). In fact, the court termed this a "'probabilistic harm'." *Id.* But the very same claim could be made for any election in which an employer unilaterally declines to oppose unionization, decides to remain neutral, which it lawfully may, and a majority opts for a union. In other words, the reasoning rests on the assumption that the Labor Act compels employer hostility to employee representation. That is not so. Robert Gorman & Matthew Finkin, LABOR LAW, *supra*, § 9.5 at p. 327-28 ("It is not unlawful assistance for an employer simply to state its preference that employees join a particular union....") (reviewing authority).

Two further considerations lead to the exclusion of § 302. First, the agreement structures the union's relationship to management, not only *after* recognition, requiring negotiation over terms and conditions of employment, the scope of union

recognition, management rights, and the processing of grievances, but also *before* recognition through rules on access, non-belligerence, recognition and labor peace. If the latter were to be a criminal act so, too, would the former; that is, a collective agreement negotiated after certification of majority status by a neutral arbitrator—or even upon voluntary recognition of actual majority status. Judge Restani, in the decision of the court below, recognized the implications were § 302 to apply here: "The LMRA cannot promote collective bargaining and, at the same time, penalize unions that are attempting to achieve greater collective bargaining rights." (667 F.3d at 1216-17.)

Second, the agreement provides for arbitration of disputes arising under it—including the very lawfulness of the undertaking itself. If an entire regime of labor-management pre-recognitional day-to-day governance that includes neutral arbitral oversight is a crime, so, too, could all other ordinary labor relations structures that include collective bargaining agreements and arbitral oversight. The implications of Respondent's § 302 argument should prompt the Court to read § 302 as inapplicable in this setting. To paraphrase Justice Jackson, certain ends are best avoided by avoiding certain beginnings. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943).

CONCLUSION

For well over half a century, *amicus* has closely observed the maturation of the American system of industrial relations and worked to advance labor arbitration. The Academy's members are experienced not only with established collective bargaining

relationships, but also with those pre-recognitional regimes of which arbitration is an integral part.[7] In the Academy's experience, such regimes are a well-established feature of healthy labor-management relations. It would be a significant retreat to place them under a cloud of potential criminality. Were the Court to decide that § 302 could apply to these agreements, companies intent on establishing good labor management relations in advance of union recognition would tend to steer clear for fear of potential criminal prosecution or third-party civil litigation. The text of § 302 warrants neither this application nor that result.

August 2013

Respectfully submitted,

Of Counsel
James Oldham,
NAA President
GEORGETOWN LAW
600 New Jersey Ave., NW
Washington, D.C. 20001

Matthew W. Finkin
Counsel of Record
THE UNIVERSITY OF ILLINOIS
COLLEGE OF LAW
504 East Pennsylvania Ave.
Champaign, IL 61820
(217) 333-3884
mfinkin@illinois.edu

Barry Winograd
1999 Harrison Street,
Suite 1400
Oakland, CA 94612

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[7] *Amicus* should not be understood to suggest that the contractual establishment of a regime of pre-recognitional governance that lacks an arbitral component would be encompassed by § 302. It is, rather, that *amicus* NAA has neither the constitutional foundation that authorizes it to address, nor any experience with such regimes. *See* text accompanying n. 3, *supra*.

AMICUS CURIAE BRIEF

SUPREME COURT, U.S.
FILED
SEP 27 2013
OFFICE OF THE CLERK

No. 12-99

In The
Supreme Court of the United States

UNITE HERE LOCAL 355,

Petitioner,

v.

MARTIN MULHALL, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND CATO INSTITUTE IN SUPPORT OF RESPONDENT MARTIN MULHALL

Karen R. Harned
Counsel of Record
Luke A. Wake
NFIB SMALL BUSINESS
LEGAL CENTER
1201 F Street, NW, Suite 200
Washington, DC 20004
(202) 314-2048
karen.hared@nfib.org
luke.wake@nfib.org

Counsel Amicus Curiae
NFIB Small Business and
Legal Center

Ilya Shapiro
CATO INSTITUTE
100 Massachusetts Avenue, NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

Counsel for Amicus Curiae
Cato Institute

Dated: September 27, 2013

THE LEX GROUP DC • 1825 K Street, N.W. • Suite 103 • Washington, D.C. 20006
(202) 955-0001 • (800) 856-4419 • Fax: (202) 955-0022 • www.thelexgroup.com

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QUESTION PRESENTED

Section 302(a)(2) of the Labor Management Relations Act, 29 U.S.C. § 186, makes it a crime for an employer to "pay, lend, or deliver, any money or other thing of value... to any labor organization..." 29 U.S.C. § 186(a)(2). Likewise, Section 302(b) makes it a crime for labor unions "to request, demand, receive, or accept ... any money or other thing of value..." *Id.* § 186(b)(1). There are nine enumerated exceptions, none of which are relevant in the present case. *Id.* § 186(c).

The question here is whether these provisions prohibit unions from demanding—and employers from delivering—free access to private property, lists of information on employees at no cost, and an uncompensated guarantee of forbearance on First Amendment rights?

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INTEREST OF AMICI CURIAE[1]

Pursuant to Supreme Court Rule 37, the National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) and the Cato Institute submit this brief *amici curiae* in support of Respondent Martin Mulhall.

The NFIB Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate and grow their businesses.

NFIB represents about 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a

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[1] Counsels of record have consented to the filing of this brief. The parties have filed a blanket consent to all amicus filings with the Clerk of Court. In accordance with Rule 37.6, *Amici* NFIB Legal Center and Cato Institute state that no counsel for a party authorized any portion of this brief and no counsel or party made a monetary contribution intended to fund the brief's preparation or submission.

year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses. The NFIB Legal Center has filed in numerous employment law and labor cases, including *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177 (2007), and *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60 (2008). NFIB Legal Center also filed an amicus brief to the 11th Circuit in the present case. As with its filing in the 11th Circuit, NFIB Legal Center files here to urge the Court to give Section 302 of the Labor Management Relations Act broad application, so as to prevent labor unions from coercing small business owners into waiving protected rights. NFIB Legal Center submits that Section 302 was intended to prevent labor unions from making extortionate demands. Given the reality that small business owners are particularly vulnerable to extortionate demands from union officials, NFIB Legal Center believes that its brief will offer a valuable perspective on the issue presented here.

Established in 1977, the Cato Institute is a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. To those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court*

Review. This case is of central concern to Cato because it implicates the right against forced association and the right not to be coerced into giving up First Amendment rights.

SUMMARY OF ARGUMENT

The Petitioner, Unite Here Local 355 ("Unite Here"), contends that labor unions should be allowed to demand—and that employers should be allowed to deliver—free access to private property, lists of information on employees at no cost, and an uncompensated guarantee of forbearance on First Amendment rights. Under this view, a decision interpreting Section 302(a)(2) of the Labor Management Relations Act (LMRA), by its plain language—as prohibiting such demands—would frustrate Congress' goal of encouraging "industrial peace." Labor Management Relations Act, 29 U.S.C. § 186. But, LMRA's overarching goal of promoting "industrial peace" cannot be served by enabling unions to wage economic war on businesses that refuse to surrender protected rights.

The sky will not fall if this Court should interpret Section 302 as prohibiting extortionate union demands. Of course Unite Here bemoans the end of its self-interested conception of "industrial peace" because an interpretation giving full effect to the prohibition on employers delivering "things of value" would prevent unions from demanding that employers remain neutral on questions of unionization, or that employers give union's access to company property, or confidential information. Unite Here wishes to maintain the prerogative to

make these demands because such concessions are objectively valuable. To be sure, they directly advance Unite Here's institutional interests.

But, Unite Here's approach is highly problematic because it would enable unions to coerce business owners into waiving protected constitutional rights—including the First Amendment right to voice opposition to unionization efforts and the fundamental right to exclude the public from private property. This is a particularly serious concern for small business owners because they are especially vulnerable to coercive union demands. Small businesses generally lack the resources to survive a targeted corporate campaign when a union threatens economic war.

Finally, *amici* file to illustrate the fact that the contested "neutrality agreement" is a "thing[] of value." Indeed, a license to enter and use private property is objectively valuable, as is an agreement to forebear on the right to speak, or an agreement to deliver information on employees. There is a functioning market for each—otherwise there would be no case before this court. By enacting Section 302, Congress wisely closed this market to unions in order to "prohibit[], among other things, the buying and selling of labor peace." *See* S. Rep. No. 98-225 (1984), reprinted 1984 U.S.C.C.A.N. 3182, 3477.

ARGUMENT

I. Industrial Peace is Better Served by Interpreting Section 302 Broadly to Prohibit Coercive Union Demands

A. Section 302 Was Intended to Protect Employees From Union Corruption and Employers From Extortionate Union Demands

Unite Here would apparently prefer to view Section 302 as serving a *singular purpose* of prohibiting employers from bribing, or otherwise corrupting, union officials with payment or delivery of money or other things with commercial value. But, Unite Here conveniently overlooks the fact that Congress intended Section 302 to serve the *dual purpose* of (a) protecting employees from union corruption and (b) protecting employers from extortionate union demands. Indeed, Section 302 was intended to apply broadly in order to avoid perversion of the unionization process. *See Arroyo v. United States*, 359 U.S. 419, 426 (1959).

It is true that Section 302 serves as a prophylactic against unscrupulous union officials abusing their posts to advance their individual interests. *See* S. Rep. No. 86-187 (1959), reprinted in 1959 U.S.C.C.A.N. 2318, 2330 (noting that the union's fiduciary relationship carries potential for abuse); *see e.g.*, *Adcock v. Freightliner*, 550 F.3d 369 (4th Cir. 2008) (concerning a case in which a union agreed not to negotiate on severance pay, and certain wage and hour issues, in exchange for

organizing assistance). Conversely, it serves as a deterrent against employers appealing to a union official's pecuniary interests, in a manner that might persuade the official to shirk his or her fiduciary responsibilities to safeguard the interests of those employees whom the union seeks to represent. *See Turner v. Local Union No. 302, Int'l Bhd. Of Teamsters*, 604 F.2d 1219, 1227 (9th Cir. 1979) (recognizing Congress intended to "prevent employers from tampering with the loyalty of union officials."); *Air Line Pilots v. O'Neill*, 499 U.S. 65, 74-75 (1991) (recognizing a fiduciary relationship between unions and employees). But Section 302—by its plain language—prohibits *all* union "request[s]" or "demand[s]" for "money or other things of value..." 29 U.S.C. § 186(b)(1). And, by its plain language, it prohibits employers from entertaining such requests by flatly prohibiting employers from "pay[ing]" or "deliver[ing] *any* money or other things of value..."[2] *Id.* § 186(a)(2) (emphasis added).

There is no qualifying language limiting Section 302's application to prevent only the "demand" and "deliver[y]" of things that benefit union officials *personally*.[3] *Am. Tobacco Co. v. Patterson*,

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[2] *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (reasoning that use of the word "any" suggests "an expansive meaning...").

[3] Given that Congress explicitly enumerated nine exceptions to Section 302's prohibitions, it would be inappropriate to infer further exceptions. *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.") (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980)).

456 U.S. 63, 68 (1982) (explaining that "'our starting point must be the language employed by Congress' ... and [that] we assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.'") (internal citations omitted). On the contrary, Section 302 expressly prohibits employers from paying or delivering things that benefit the union as an institution. 29 U.S.C. § 186(a)(2) (employer is prohibited from "pay[ing], lend[ing], or deliver[ing], any money or other thing of value... *to any labor organization...*") (emphasis added). Accordingly, the plain language confirms that Section 302 was also intended "to deal with 'extortion or a case where the union representative is shaking down the employer.'" *Arroyo*, 359 U.S. at 426, n.8 (quoting 93 Cong. Rec. 4746 (Sen. Taft)).

Indeed, the legislative record demonstrates that Section 302 was adopted in response to a seemingly extortionate demand, made by union officials, that a mining company should pay money into a union welfare fund under "the sole control of the union ... [and] [which] could be used as the individual officers saw fit." *United States v. Ryan*, 350 U.S. 299, 304-305 (1956); *see also* S. Rep. No. 105, 80th Cong., 1st Sess. 52 (1947) (Senate Report). Thus, in crafting Section 302, Congress was careful to paint with a broad brush so as to advance the goal of preventing both union corruption and extortion. *See* S. Rep. No. 86-187 (1959), reprinted 1959 U.S.C.C.A.N. 2318, 2329 (expressing congressional intent that the statute be "applicable to all forms of extortion or bribery in labor-management relations."). Congress sought to "prohibit[], among other things, the buying and selling of labor peace."

S. Rep. No. 98-225 (1984), reprinted 1984 U.S.C.C.A.N. 3182, 3477.

B. Unions Commonly Wage Economic War to Coerce Businesses Into Waiving Constitutionally Protected Rights

i. Corporate Campaigns Aim to Pressure Employers into Delivering Organizational Assistance

Though Unite Here bemoans the fact that no court had previously held Section 302 to prohibit "neutrality agreements," it would be fallacious to say that this speaks to whether—in fact—Congress intended Section 302 to prohibit extortionate union demands.[4] For one, it makes sense that this issue is only now working its way through the courts because, as unions have lost influence in recent years, labor organizations have increasingly turned to new strategies to pressure employers into entering organizing assistance agreements. *See* Mark A. Carter & Shawn P. Burton, *The Criminal Element of Neutrality Agreements*, 25 Hofstra Lab. & Emp. L.J. 173, 176 (2007). Labor unions have only relatively recently moved toward insisting upon "neutrality agreements" as a term of peace in targeted "corporate campaigns." Charles I. Cohen et.

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[4] *See* Andrew Jay McClurg, *Logical Fallacies and the Supreme Court: A Critical Examination of Justice Rehnquist's Decisions in Criminal Procedure Cases*, 59 U. Colo. L. Rev. 741, 770 (1988) (explaining that a negative premise cannot compel a positive conclusion).

al., *Resisting Its Own Obsolescence-How the National Labor Relations Board Is Questioning the Existing Law of Neutrality Agreements*, 20 Notre Dame J.L. Ethics & Pub. Pol'y 521, 522 (2006) (observing that, "[a]lthough neutrality agreements are now [] common...[,] that was not the case as recently as a decade ago.").

As explained by a prominent officer of the AFL-CIO, Richard Trumka, "[c]orporate campaigns swarm the target employer from every angle, great and small, with an eye toward inflicting upon the employer the death of a thousand cuts rather than a single blow." Jarol B. Manheim, THE DEATH OF A THOUSAND CUTS: CORPORATE CAMPAIGNS AND THE ATACK ON THE CORPORATION (Lawrence Erlbum Assoc. 2001). Union campaigns have been acknowledged by courts as involving a "wide and indefinite range of legal and potentially illegal tactics," including "litigation, political appeals, requests that regulatory agencies investigate and pursue employer violations of state and federal law, and negative publicity campaigns aimed at reducing the employer's goodwill with employees, investors, or the general public." *Food Lion, Inc. v. UFCW*, 103 F.3d 1007, 1014 n. 9 (D.C. Cir. 1997); *see also Diamond Walnut Growers v. NLRB*, 113 F.2d 1259 (D.C. Cir. 1997); *Smithfield Foods v. UFCW*, 585 F. Supp. 2d 789, 795-97 (E.D. Va. 2008). Simply put, a corporate campaign is "an attack by a union on the ability of a company or industry to conduct its routine business...[,] [with an] objective [of] generat[ing] so much pressure on the 'target' that it will give in to union demands." Jarol B. Manheim, *Trends in Union Corporate*

Campaigns: A Briefing Book (U.S. Chamber of Commerce, 2005).

In carrying out corporate campaigns, unions seek to "exploit vulnerabilities" of key company relationships by, for example, putting pressure on management and the company's financial stakeholders. Jarol B. Manheim, *Trends in Union Corporate Campaigns: A Briefing Book* (U.S. Chamber of Commerce 2005).[5] Unions can also effectively intimidate business owners into submitting to demands for organizational assistance, by threatening to initiate frivolous claims, or threatening to ask regulatory agencies to scrutinize the company. *See also* Dan La Botz, *A Troublemakers Handbook: How to Fight Back Where You Work—and Win!*, 127 (1991) ("Every law or regulation is a potential net in which management can be snared and entangled."). Knowing that a complaint—even an unsubstantiated one—may cost a business time, energy and money, these tactics can be extremely effective in corralling employers into surrendering things of value that benefit the institutional interests of the union.

ii. In Pressuring Employers to Sign "Neutrality Agreements," Unions Coerce Waiver of Protected Rights

The unions are not merely seeking to obtain institutional benefits when targeting an employer in a corporate campaign. What is at stake is even

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[5] *Available* at http://www.uschamber.com/reports/trends-union-corporate-campaigns (last visited Sept. 24, 2013).

greater. At issue is the question of whether an employer has a right to be free from coercive demands to waive protected constitutional rights. Indeed, the very concept of a "neutrality agreement" is premised in the idea that an employer waives First Amendment rights to oppose unionization efforts; of course, that should only be acceptable where the employer wishes to do so *voluntarily*. Zev J. Eigen & David Sherwyn, *A Moral/contractual Approach to Labor Law Reform*, 63 Hastings L.J. 695, 721 (2012) (observing that "the common denominator for all [neutrality agreements] is that employers agree to remain neutral to the union's attempt to organize the workforce."). As such, there is a serious problem when a labor organization applies coercive pressure in order to force a waiver of the right to free speech. *See NLRB v. O'Keefe & Merrit Mfg. Co.*, 178 F.2d 445, 447-448 (9th Cir. 1950) (employers have a right to oppose unionization); *see also See Chamber of Commerce v. Brown*, 554 U.S. 60, 68 (2008).

Likewise, when unions wage—or threaten to initiate—economic war, they will often offer a ceasefire on the condition that the targeted business must waive protected property rights. *See* Pet. Br. at 39 (admitting that an agreement to "limit" a company's exercise of property rights may be an "object of coercion"). As in the present case, employers are commonly forced to choose between waiving the right to exclude the public from the company's private property, and a war of attrition with a union demanding access to company facilities. Eigen & Sherwyn, *supra*, 63 Hastings L.J. at 721. To the extent that a union demands use of other forms

of property—including confidential proprietary information, as in this case—the union is likewise forcing employers to choose between "peace" and the continued exclusive enjoyment of company property. *Hendler v. United States*, 952 F.2d 1364, 1374-75 (Fed. Cir. 1991) ("The notion of exclusive ownership as a property right is fundamental to our theory of social organization.").

To be sure the right to exclusive use of private property is a fundamental right of ownership and is constitutionally protected—so much so that the government cannot pressure a landowner into waiving the right to exclude. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 102 S. Ct. 3164, 3171, 73 L. Ed. 2d 868 (1982); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 at 831, 107 S. Ct. 3141 at 3145, 97 L. Ed. 2d 677 (1987). Indeed, our Fifth Amendment jurisprudence recognizes that government should not be enabled to coerce individuals into waiving protected property rights without compensation.[6] *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013). Similarly our First Amendment jurisprudence holds that government cannot pressure individuals into waiving the right to free speech. *See e.g.*, *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972); *Rumsfeld v.*

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[6] Citing *Lechmere v. NLRB*, 502 U.S. 527, 532-34 (1992), Respondent, Martin Mulhall, correctly notes that "unions have no statutory right to use an employer's private property for organizing." *Amici* stress further that the doctrine of unconstitutional conditions would prevent Congress from ever imposing such a requirement on businesses because it would improperly force businesses to waive the right to exclude the public as a condition of operating a commercial enterprise.

Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 59–60 (2006). The overarching principle in these cases—referred to as the unconstitutional conditions doctrine—recognizes that there are compelling reasons for protecting constitutional rights against coerced waivers. *See Frost v. R.R. Comm'n of State of Cal.*, 271 U.S. 583, 594 (1926) ("It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."). And given that government exists for the purpose of protecting our constitutional rights, those same policy concerns should inform this Court's interpretation of Section 302. Indeed, it is reasonable to assume that Congress intended to prevent unions from applying coercive pressure to compel employers into waiving their First and Fifth Amendment rights.[7] *See Chamber of Commerce v. Brown*, 554 U.S. at 68 (noting that in enacting the NLRA Congress made a "policy judgment ... 'favoring uninhibited, robust, and wide-open debate in labor disputes...'" (quoting

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[7] In a true demonstration of chutzpah, Unite Here suggests that its interpretation—allowing unions to demand "neutrality agreements"—is somehow protective of the employer's right to remain silent on issues of unionization. Pet. Br. 48-50. Indeed, it is well established that the First Amendment protects the right of employers to choose whether or not to oppose unionization, but the right to remain neutral *is not* at issue here. *See Kimbrell v. NLRB*, 290 F.2d 799, 801-802 (4th Cir. 1961). Regardless of whether Section 302 prohibits unions from demanding—and employers from delivering—"neutrality agreements," employers are free to *voluntarily* choose to remain neutral on union issues. Accordingly, the real issue here is whether unions may continue to make coercive demands upon employers, to waive their protected right to oppose unionization efforts.

Letter Carriers v. Austin, 418 U.S. 264, 272-273 (1974)).

C. The Union's Interpretation Encourages Industrial Strife—Not Peace

Unite Here belabors the point that the LRMA was enacted with the overarching goal of promoting "industrial peace." *See* Pet. Br. at 13 (asserting Muhall's theory would "criminalize ... industrial peace..."). But, the Union goes on to advocate an exceedingly narrow interpretation of Section 302, so as to preserve the prerogative of unions to wage economic war against targeted companies that refuse to give into demands for: (a) neutrality [i.e. waiver of the right to oppose unionization], (b) access to private property [i.e. waiver of the right to exclude the public], and (c) access to confidential proprietary information [same]. Thus, the Union's essential policy argument—that a broad interpretation will inhibit industrial peace—is a deftly disguised affirmation of the fact that there can be no industrial peace so long as unions are allowed to torment, or harass, businesses that refuse to comply with extortionate demands. *See* Pet. Br. at 27 (stating that unions value "neutrality agreements" enough to give up their most "potent tool[s]").

The notion that "industrial peace" is inhibited by prohibiting unions from demanding "neutrality agreements" is nothing more than doublespeak. Of course, in a sense it is always true that one can buy a form of peace by giving into extortionate demands. An owner can always "buy" a form of peace from a

cartel that threatens to destroy his or her home, by submitting to demands for money or other things of value. Bennett G. Young, Chris W. Lacy, Michael J. Kass, Kathryn A. Nyce, *Privilege Survives Coerced Disclosures to Federal Investigators*, 18 Competition: J. Anti. & Unfair Comp. L. Sec. St. B. Cal. 23, 31 (2009) ("By definition, extortion contemplates a volitional and consensual act by the victim..."). But, there is no true peace where an owner is subject to such demands in the first place. Likewise, a regime allowing unions to threaten continued hostilities until employers give into demands for organizing assistance is not truly conducive to "industrial peace." Instead unions are emboldened to make coercive demands, and to pressure employers until they give up protected rights in a negotiated ceasefire. *See Koontz*, 133 S. Ct. at 2595 (rejecting a rule that "would enable the government to [systematically] evade limitations" meant to prohibit extortionate practices). It seems unlikely that this is what Congress had in mind with enactment of Section 302. *See Arroyo*, 359 U.S. at 426.

D. Small Businesses Are Especially Vulnerable to Extortionate Shakedown Practices

Corporate campaigns can ring the death knell for small businesses that resist demands for neutrality, access to private property, and access to confidential proprietary information. Whereas large businesses, such as Wal-Mart, Verizon, and Nike, are accustomed to dealing with labor disputes, small businesses generally lack the resources needed to

combat and survive corporate campaigns.[8] Small businesses do not usually employ specialized human resource managers, labor consultants or in house counsel.[9] Instead small business owners must either seek outside counsel—at great cost—or become personally enmeshed in time demanding union campaigns.

Small business owners often report that they must spend excessive energy dealing with targeted corporate campaigns. For example, one small business owner described his experience stating that he "logged 20 hour days talking one-on-one with employees and leading meetings where [he] pointed out that unions had not saved local jobs in... 10 factories that recently closed." *Unions: We're Better Off Without Them How the Obama Administration's Push for Employee Free Choice Act Could Cripple the Backbone of the Economy: Small Businesses*, Kevin Kelly, Newsweek, July 2009. Without doubt, small business owners are diverted from spending their time running their ordinary business operations when dealing with corporate campaigns—and are therein inhibited from turning a profit. *See* Small

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[8] Small businesses depend heavily on the local community, and are therein especially vulnerable to targeted efforts to tarnish the company's public image. Unlike large corporations, with a national consumer-base, it is easier for an aggressive corporate campaign to create enough noise to materially disparage a small business' image within the community in which its entire consumer-base is concentrated.

[9] *See* Damien M. Schiff, Luke A. Wake, *Leveling the Playing Field in David v. Goliath: Remedies to Agency Overreach*, 17 Tex. Rev. L. & Pol. 97, 123 (2012) (generally discussing the special challenges facing small business owners in regulated industries).

Business Legal Center Testifies on Legal Reform: NFIB Testifies Before House Judiciary Committee, National Federation of Independent Business (Mar. 12, 2013).[10] This can cripple a small business and is ultimately harmful for employees.[11] But of course the very goal of a union's corporate campaign is to make it impossible for a company to carry on business without capitulating to its demands. Accordingly, since small businesses usually lack the resources to effectively and efficiently manage corporate campaigns, they make easy targets.

II. The Contested "Neutrality Agreement" Delivered a License, a Guarantee of Forbearance and Proprietary Interests—All With Objective Commercial Value

Unite Here repeatedly affirms that "things of value" must be understood to mean "'things with commercial value,'" and that it would be inappropriate to consider things with mere

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[10] *Available* at http://www.nfib.com/legal-center/compliance-resource-center/compliance-resource-item/cmsid/62326 (last visited Sept. 24, 2013).

[11] Moreover, when unions resort to lodging questionable claims with regulatory agencies, or otherwise prompting administrative investigations, small business owners may be paralyzed dealing with unnecessary inspections or audits. Furthermore, when a small business is faced with a frivolous claim, it can prove tremendously costly if fines are assessed, or if the owner is forced to retain an attorney in order to vindicate its name. *See* NFIB Legal Center Testifies on Legal Reform, *supra* (explaining small business owners generally "do not have the resources needed to hire an attorney nor the time to spend away from their business fighting [frivolous legal battles].").

"'subjective value'" to be covered by Section 302.[12] Pet. Br. at 13 (acknowledging that "'things of value' ... must be read to mean something of commercial value..."); *but see Local 144 Nursing Home Pension Fund v. Demisay*, 508 U.S. 581, 585 (1993) (explaining that Section 302's "prohibitions... are drawn broadly."). Even if Section 302 is so construed, it should be recognized that the contested "neutrality agreement," delivered a license to use private property, a forbearance on the right to speak, and a collection of confidential proprietary information—each of which has objective value in a free market.[13]

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[12] The Solicitor General appropriately acknowledges that "[c]ourts have found a wide variety of goods, services, and benefits to be 'things of value' within the meaning of criminal laws." S.G. Br. 16-17. Nonetheless the Solicitor General contends that the full text of Section 302 suggests "a financial-transfer focus for [the] term ["thing of value"]—for example, delivery of free tickets to a sporting event." *Id.* at 18. But it makes no sense to say that Section 302 would prohibit an employer from delivering free tickets to a sporting event if it is not also understood to prohibit an employer from delivering other things with market value. As explained herein, there is no material difference between delivering free tickets and delivering a license to use company facilities, a forbearance on free speech, or confidential proprietary information. There is a 'market' for each.

[13] *Amici* agree with Respondents that the phrase "things of value" encompasses both objective and subjective values. *See United States v. Nilsen*, 967 F.2d 539, 542 (11th Cir. 1992) (explaining that the "thing of value" is a "term of art[,] which the courts generally construe to envelop[] both tangibles and intangibles."); *Morissette v. United States*, 342 U.S. 246, 263, 72 S. Ct. 240 (1952) ("[W]here Congress borrows terms of art... it presumably knows and adopts the ... the meaning its use will convey to the judicial mind unless otherwise instructed.").

A. A License to Use Private Property is Objectively Valuable

It is well established, in the law of eminent domain, that the right to exclude the public from private property is objectively valuable. *Loretto*, 458 U.S. at 436-37 (holding government must pay just compensation for any physical occupation of private property). Even a temporary invasion of private property is compensated in an inverse condemnation action for the "fair market" rental value of the space at issue. *See Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 519 (2012); *see also United States v. Gen. Motors Corp.*, 323 U.S. 373, 382-83 (1945) (discussing short-term market rental values for a warehouse that the federal government temporarily occupied). When courts seek to assess the "fair market value" of rented space on a segment of private property, they look to indicia of what private parties would likely agree to in negotiating use and access to the property. *See United States v. 564.54 Acres of Land, More or Less, Situated in Monroe & Pike Counties, Pa.*, 441 U.S. 506, 511 (1979).

Moreover, these valuations are based on the actual state of the real estate and rental markets. *Id.* As first year law students know, the market for licenses, or easements, to use private property is not theoretical. It is usually necessary to pay for the right to use a business' property for your own private purposes.

Businesses commonly rent out their facilities for many potential uses and potential patrons. For

example, hotels commonly rent conference rooms for businesses and organizations to hold events and meetings. A property management company might frequently rent out space for weddings, or fundraising events. Likewise, a company owning office space might choose to rent out conference rooms on an hourly basis for independent contractors looking for a place to meet clients.[14]

Of course the mere fact that a business has not—thus far—engaged in the market for short-term rental space does not foreclose the business from doing so in the future. Nor does it negate the reality that there is a vibrant market for short-term rental facilities. *See e.g.*, Event Spaces and Meeting Spaces in Washington DC, EVenues (listing hourly and daily rates for 156 short-term rental spaces in the District of Columbia).[15] The fact is that private parties and organizations often need to rent meeting spaces for a variety of reasons, and potentially any space could be rented. The rental value of such space depends upon many factors—including "the kind of building to be occupied, [] its location, [] its susceptibility to various uses, [] its conveniences, or the reverse, and [] many other factors which go to set the value of the occupancy." *Gen. Motors Corp.*, 323 U.S. at 380 (1945). Thus, the fair market value of a license to use a meeting space necessarily depends

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[14] For example, Liquidspace advertises hourly office space rentals online. *See* Liquidspace, *available* at https://liquidspace.com/ (last visited Sept. 24, 2013)

[15] *Available* at http://www.evenues.com/Meeting-Spaces/Washington/DC (Sept. 24, 2013).

on the going-rate of similarly suited meeting spaces.[16]

B. A Guarantee to Forebear on First Amendment Rights is Objectively Valuable

In the same way as one must negotiate a rental agreement to attain a license to use private property, one must offer valuable consideration to attain a binding agreement that a business will forebear on the right to engage in free speech.[17] While it is always true that a business has the prerogative to choose to remain silent, the business also retains the right to speak—unless the business has entered into a binding agreement to forebear on such rights. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 343 (2010) (recognizing businesses have First Amendment rights); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (explaining that the First Amendment protects "both the right to speak freely and the right to refrain from speaking at all."). And usually the right to engage in free speech is not lightly relinquished.

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[16] It is true that a property owner might sometimes choose to provide access to civics groups, or other organizations, at no cost. But, in such a case, free access amounts to a charitable gift. This is because it is ultimately the exclusive right of the landowner to decide when, and to whom, to grant access and use of private property. This is the most fundamental right of private property ownership, and necessarily has value. *Hendler*, 952 F.2d 1374-75.

[17] Likewise, a party wishing to ensure that a property owner will forebear on common law property rights must negotiate a negative easement, which will necessarily require valuable consideration.

For an individual or business to enter into an agreement to waive First Amendment rights—an agreement that gives another party an enforceable right to enjoin free speech—it is usually necessary to offer something of value in exchange. *See e.g.*, *People v. Hochberg*, 62 A.D.2d 239, 246-47, 404 N.Y.S.2d 161, 167 (3d Dep't 1978) (holding an agreement not to run in a primary election to be a thing of value). For example, a company renting space on a billboard necessarily chooses to waive its right to leave the billboard empty when it contracts to advertise for another business; in such a case the billboard company is agreeing to waive its right to remain silent and simultaneously agreeing to speak on behalf of the contracting business.[18] *See Nat'l Ass'n of Mfrs. v. N.L.R.B.*, 717 F.3d 947, 956 (D.C. Cir. 2013) ("[A]ll speech inherently involves choices of what to say and what to leave unsaid.") (quoting *Pac. Gas & Electric Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 11 (1986) (plurality opinion)). A company might also be willing to enter an agreement to hold-off on advertising within a specified geographic market. *See e.g.*, *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 626-27 (1977) (company entered a non-competition agreement in exchange for valuable consideration). Such an agreement may well raise antitrust problems, but that is because it would be objectively valuable to a competing company seeking to establish a monopoly in that market. Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of*

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[18] Likewise, an author with plans to publish a book might be dissuaded from doing so if offered enough money from an interested party. For that matter, in any dispute, an individual might agree to forebear on the right to speak on an issue in order to secure a financial settlement.

Law?, 42 U.C. Davis L. Rev. 1375, 1385 (2009) (noting that anticompetitive agreements allow a company to raise prices).

Agreements to forebear on free speech are especially common in the entertainment industry.[19] For example, a company may be willing to pay a premium to ensure that a celebrity is exclusively endorsing its products or representing its company.[20] *See e.g.*, Michael Buteau, *Roy McIlroy Joins Tiger Woods in Nike Golf Sponsorships*, Bloomberg (Jan. 14, 2013). For that matter, television and movie producers commonly enter agreements to feature products—therein waiving their right to opt against featuring such products, or against the right to feature competing products. *See* Clarissa Sebag-Montefiore and Steven Zeitchik, *Chinese Pay for Product Placement in Hollywood Movies*, LA Times

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[19] For example, for various reasons, a professional sports team might insist on a gag-clause to prevent an athlete from speaking on controversial issues. For example, Jackie Robinson was offered a contract to play baseball for the Brooklyn Dodgers, but was contractually required to refrain from engaging in certain forms of speech. Jim Peters and Hillary Smith, *Jackie Robinson's Fight in Baseball Continues*, NWI Times (Apr. 11, 2013), *Available* at http://www.nwitimes.com/sports/baseball/professional/jackie-robinson-s-fight-in-baseball-continues/article_514e6a51-b36a-59fc-9ffa-d5b36c293085.html.

[20] *Available* at http://www.bloomberg.com/news/2013-01-14/rory-mcilroy-joins-tiger-woods-as-sponsor-of-nike-golf-equipment.html (last visited Sept. 24, 2013).

(Sept. 11, 2012) (discussing prevalence of product placement in cinema and television).[21]

Moreover, agreements to forebear on free speech are made every day and in every industry—and always for valuable consideration. *See e.g.*, *E.E.O.C. v. Severn Trent Servs., Inc.*, 358 F.3d 438, 441 (7th Cir. 2004) (referring to nondisparagement clauses as "common" and "unexceptionable."). To be sure, many companies require employees to abide by social media policies, which may potentially restrict what topics employees may publically speak on. *See* NFIB Guide to the Employee Handbook, NFIB Small Business Legal Center, 7 ("Model Employee Handbook").[22] Even before the advent of Facebook and Twitter, many businesses adopted policies requiring employees to forebear on their right to publically disparage the company. John L. Hines, Jr., Michael H. Cramer, Peter T. Berk, *Anonymity, Immunity & Online Defamation: Managing Corporate Exposures to Reputation Injury*, 4 Sedona Conf. J. 97, 106 (2003) ("[Q]ualifications [on an employee's speech rights] as they relate to confidential information, trade secrets and harassment are not new.").

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[21] *Available* at http://articles.latimes.com/2012/sep/11/entertainment/la-et-ct-chinese-pay-for-product-placement-in-hollywood-movies-20120910 (last visited Sept. 24, 2013).

[22] *Available* at http://www.nfib.com/portals/0/PDF/Members/Legal/Guides/employee_handbook.pdf (last visited Sept. 24, 2013) (suggesting employers should include language warning employees that inappropriate commentary on social media may result in termination).

Further, most companies require employees to abide by a dress code, which necessarily restricts how employees might express themselves. *See* Model Employee Handbook, *supra* at 6 (noting employers may wish to include "specific requirements... [i]ncluding information regarding uniforms, safety protections... and other dress requirements."); *but see, Cohen v. California*, 403 U.S. 15 (1971) (holding that freedom of expression entails decisions on how to present oneself in public). Nonetheless, employees willingly accept positions with these companies knowing that they are required to forebear on their free speech rights as a condition of continued employment. They freely choose to abide by these conditions because they value their salaries and other pecuniary benefits of employment.

There are many reasons why an individual or business may legitimately choose to enter an agreement to forebear on free speech. Such agreements are common and do in fact have a market value. Of course, the fact that one must generally offer something of value in order to attain a guarantee of forbearance on First Amendment rights demonstrates that a guarantee of forbearance is necessarily a "thing of value."

C. A Collection of Information on Employees Has Objective Commercial Value

Any collection of information on a company's customers or employees is going to have some degree of commercial value in the free market. Jessica Litman, *Information Privacy/Information Property*,

52 Stan. L. Rev. 1283 (2000) (explaining that businesses commonly "collect[] information about us to use in marketing products" and that collected information can be "sold."); Walter W. Miller, Jr. & Maureen A. O'Rourke, *Bankruptcy Law v. Privacy Rights: Which Holds the Trump Card?*, 38 Hous. L. Rev. 777, 788 (2001) (noting that customer lists and associated information can be used as collateral). This sort of information is especially valuable to marketing companies. Indeed, marketing campaigns are most successful when marketers can gather information on potential consumers. Such information can give marketers insights into the tastes and priorities of a targeted demographic or may prove helpful in identifying specific consumers for solicitations. Julia Alpert Gladstone, *Data Mines and Battlefields: Looking at Financial Aggregators to Understand the Legal Boundaries and Ownership Rights in the Use of Personal Data*, 19 J. Marshall J. Computer & Info. L. 313, 329 (2001) ("The use of customer databases has become a critical strategy to successful business, and, thus, consumer profiles are a valuable intangible asset."). Accordingly, many companies are willing to pay money in order to obtain information on perspective consumers. Xuan-Thao N. Nguyen, *Collateralizing Privacy*, 78 Tul. L. Rev. 553, 581 (2004) ("Companies spend significant resources to collect customer information, maintain the information in computer databases, and prevent others from unauthorized mining.").

The fact that labor unions are not in the business of selling products to consumers does not change the reality that there is an active market for information on consumers, including information on

any given business's employees. A union seeking to gain support from a majority of a company's employees resembles a marketing company in so far as it places a value on obtaining this sort of information. *See U.S. v. Sheker*, 618 F.2d 607, 609 (9th Cir. 1980) ("Information obtained for political advantage might have value apart from its worth in dollars."); *see also* Hayley Tsukayama, *Microtargeting has Growing Influence in Political Campaigns, Says Interactive Advertising Bureau*, Washington Post (Feb. 26, 2013) (explaining the economic value of gathering information on perspective voters in a political campaign).[23] Indeed, when unions demand that a company must handover information on its employees, the union seeks this information to facilitate its own marketing campaign. The only difference is that a marketing company seeks to solicit prospective consumers, whereas a union seeks to solicit prospective members. *See* Zev J. Eigen & David Sherwyn, *A Moral/Contractual Approach to Labor Law Reform*, 63 Hastings L.J. 695, 722 (2012) (noting that unions have a much greater success rate in unionization efforts when they can compel businesses into handing over information on employees).

Furthermore, if Congress had not expressly prohibited employers from delivering "things of value" to unions, and if the delivery of such information would not violate employee privacy

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[23] *Available* at http://www.washingtonpost.com/blogs/post-tech/post/microtargeting-has-growing-influence-in-political-campaigns-says-interactive-advertising-bureau/2013/02/26/32e0723e-8023-11e2-b99e-6baf4ebe42df_blog.html (last visited Sept. 24, 2013).

protections, unscrupulous employers could conceivably sell employee information to the highest union-bidder.[24] *See United States v. Girard*, 601 F.2d 69, 71 (2d Cir. 1979) (recognizing that "private records" constitute property and a "thing of value"). Since such information would give the acquiring union a competitive advantage over other unions seeking to represent the company's employees, unions would be willing to bid against each other for such information. Indeed, if Congress had not explicitly closed this market, the fair market value of such information would be established in the same manner as fair market value is established with any other proprietary interest—its worth would be determined by the union's subjective decision as to how greatly it values that which it seeks.[25] *564.54 Acres of Land*, 441 U.S. at 511 (explaining that fair market value is what a willing buyer would pay a

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[24] United Here seems unconcerned over potential privacy concerns from those employees who might prefer that their employer refrain from sharing their personal information. One might expect that Unite Here would object to an employer selling such information to another business. But apparently Unite Here sees no problem with insisting that employers share confidential information on employees when it benefits the union's institutional interests.

[25] As Respondent Martin Mulhall notes, Unite Here has admitted the fact that it placed value on the contested "neutrality agreement." Pet. App. 71 (stating that, in failing to honor the neutrality agreement, Mardi Gras "increased [the union's] organizing expenses and [caused] lost revenues for the Union."). Moreover, the fact that Unite Here was willing to spend $100,000 in satisfaction of the agreement—in campaigning for legalization of slot machines in Miami-Dade and Broward counties—demonstrates that Unite Here valued the benefits conferred by at least that much. *See* Pet. App. 44, 48.

willing seller); *see also Carpenter v. United States*, 484 U.S. 19, 26 (1987) (affirming that "[confidential business information has long been recognized as a property.").

CONCLUSION

For the foregoing reasons, this Court should hold that Section 302 prohibits unions from demanding—and employers from delivering—a license to access and use private property, a forbearance on free speech, or information on employees because such concessions are valuable. Accordingly, this Court should affirm the decision of the Federal Court of Appeal for the Eleventh Circuit.

Respectfully submitted,

KAREN R. HARNED*
**Counsel of Record*
LUKE A. WAKE
Of Counsel
NFIB Small Business Legal Center
1201 F Street, NW Suite 200
Washington, DC 20004
(202) 314-2048
Karen.Harned@nfib.org
Luke.Wake@nfib.org

Ilya Shapiro
Cato Institute
1000 Massachusetts Avenue, NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org